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Producing Justice in Poor People's Courts: Four Models of State Legal Actors

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PRODUCING JUSTICE IN POOR PEOPLE'S COURTS: FOUR MODELS OF STATE LEGAL ACTORS

by
Tonya L. Brito *

This Article examines how judges and government attorneys produce justice in poor people's courts, which are characterized by a substantial volume of cases, socioeconomically disadvantaged litigants, and an absence or asymmetry of representation. The Article's findings are drawn from an extensive qualitative empirical study of one type of poor people's court, specifically family court proceedings where the state is pursuing child support from low- and no-income noncustodial fathers. Focusing on the judges and government lawyers who

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handle these cases, and drawing from their own accounts as well as on ethnographic in-court observations, I identify four distinct models of state legal actors that emerge from the study’s empirical data: navigators, bureaucrats, zealots, and reformers. These models are distinguished by the legal actors’ perceptions of the cases they handle, their conception of their role in the cases, their approach to enforcement and decision making, and how they produce justice in legal disputes involving poor and disadvantaged people.

Navigators are morally conflicted by the cases they see in poor people’s courts and, though they express sympathy for poor fathers who cannot pay support, they are also somewhat defensive about their own role and report feeling as if they themselves are in a bind. I refer to their enforcement and decision-making approach to the cases as a harm-reduction strategy because they attempt to keep the cases spinning in place to avoid the harshest outcome—civil incarceration—for poor fathers who fail to pay support. Bureaucrats view these cases as “open and shut” and, espousing a legal formalist approach, believe that they are simply doing their job without regard to questions of moral judgment. They deemphasize the discretion they enjoy and contend that they are evenhandedly administering justice. Zealots, by contrast, express hyper-moralistic views of the parents in child support cases and perceive the poor fathers uniformly as deadbeat dads. The judges and government attorneys who fall into this category view themselves as righteous child advocates and pursue an aggressive enforcement approach in order to make fathers into more responsible citizens. Finally, reformers have a nuanced and sophisticated understanding of the moral complexities raised in these cases. They report being troubled by what is happening to the families in their courts and, through their efforts at change, take on the role of internal reformers.

This Article contributes theoretical insight into the scholarly debate about the meaning(s) of access to justice. Through an empirically rigorous and grounded exploration and analysis of how civil justice works in poor people’s courts, this Article finds that justice is not one story, but many.

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INTRODUCTION

This Article examines how judges and government lawyers understand, perceive, and produce justice in poor people's courts. I use the term "poor people's courts" to refer to state civil courts hearing family, housing, administrative, and consumer cases.¹ These courts present serious challenges to the civil justice system because they are characterized by a substantial volume of cases, socioeconomically disadvantaged litigants, and an absence or asymmetry of representation.² Of increasing concern are the problematic outcomes in poor people's courts—the pro se, low-income litigants in these cases typically lose out to the creditors, landlords, and municipalities they come up against.³

Government lawyers and judges who operate in poor people's courts have a responsibility to pursue justice on behalf of the state in cases—such as child support enforcement, eviction and foreclosure, municipal fees and fines, student loan default, immigration hearings, and credit collections—where they are daily witnesses to some of our most urgent and vexing societal problems. Yet, justice is illusory in cases marked with financial hardships that stem from shortcomings in our social welfare system and political economy, such as stagnant wages and rising inequality. Coupled with the challenging conditions of poor people's courts, the public policy choices that undergird the United States' social welfare policies place these government lawyers and judges in a nearly impossible situation.

State civil courts unmask the limits of the legal system to adequately resolve legal troubles stemming from systemic poverty and inequality. They are not equipped to provide the essential resources, such as affordable housing, adequate education and training, and stable "living wage" jobs that would help to alleviate socioeconomic disadvantage. State legal actors operating poor people's courts are on the front lines of public service. They handle cases where disadvantaged pro se litigants systematically lose out and, by virtue of their actions and reasoning in these cases, they themselves can become implicated in these problematic court outcomes.

This Article explores how legal professionals navigate and make sense of their role in one type of poor people's court proceeding: child support cases involving indigent dads. Specifically, I present findings from a qualitative empirical study of

¹ See VICKI LENS, POOR JUSTICE: HOW THE POOR FARE IN THE COURTS, at x–xi (2016); Elizabeth L. MacDowell, *Reimagining Access to Justice in Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473, 475 (2015).

² The characteristics of poor people's courts are increasingly found on a more widespread basis in state court litigation. See Anna E. Carpenter et al., *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 258 (2018) ("Twenty-five years ago, nearly every party in state court litigation was represented. Today, the vast majority of people who appear in state court have no counsel and defendants are the party least likely to be represented. In seventy-six percent of cases, at least one party lacks counsel." (footnotes omitted)).

³ *Id.* at 259.

family court cases in which the state is pursuing support from low- and no-income noncustodial fathers, many of whom lack the financial resources to pay the support they owe. Child support enforcement in poor families like these—where the state is attempting to draw blood from a stone—is challenging and largely unsuccessful. The court cases in this area of family law are characterized by persistent poverty, a lack of representation, and potential unfairness. Though aggressive enforcement is potentially harmful to low-income fathers, it nonetheless persists in part because of the widespread societal view that all fathers, even very poor fathers, should be made to support their children. This Article illuminates how legal actors attempt to produce justice in this legal setting.

Focusing on the judges and government lawyers who handle these cases and drawing from their own accounts as well as on ethnographic in-court observations, this Article analyzes how they produce justice in legal disputes involving poor and disadvantaged people. Here I have identified four distinct models or types of state legal actors that emerge from the study's empirical data: navigators, bureaucrats, zealots, and reformers. Drawing on field research in six counties in two Midwestern states, I describe these four types of legal professionals and their reactions to the child support cases they handle. In developing these models, I analyze several components: (1) the narratives they use to describe the litigants and proceedings, including their take on issues of justice and morality; (2) how they perceive their role as government attorneys and judicial officers in these cases; (3) the law enforcement approach they adopt when enforcing and adjudicating these cases; and (4) what kind of "justice" they produce through their approach.

Part I of this Article examines the experience of needy families within the child support system and illuminates the serious civil justice issues that arise when the state pursues support from no- and low-income fathers. Child support enforcement actions offer a rich setting for exploring how justice is produced in poor people's courts. Although child support is meant to secure financial support for children, many fathers who are under a legal obligation to pay support are themselves impoverished. Indeed, many of the mothers and fathers in these cases experience intransigent poverty, and the families often lack sufficient financial resources to adequately support even one household, much less two. In practice, these no- and low-income fathers, who are distinguished in the policy and academic literature as "unable non-payers" and "deadbroke dads" (rather than "deadbeat dads"),⁴ accrue significant child support arrearages and face civil incarceration for their failure to pay support. Perhaps not surprisingly, many of the fathers perceive the system as unfair, and

⁴ See Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1003 (2006); Elaine Sorensen & Chava Zibman, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, 75 SOC. SERV. REV. 420, 420 (2001). See generally Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127 (2011).

complain that the judges and government lawyers they encounter in court are out to get them.

Part II reviews the existing scholarly research in this area of law and highlights the contributions of this Article to the field. Part III provides an overview of this qualitative study's methodology with a focus on the research plan and data collection sources.

Part IV presents my findings on the four models or types and shows how legal actors make meaning from their experience in child support enforcement actions involving very poor fathers. These models are distinguished by the legal actors' perceptions of the cases they handle, their conception of their role in the cases, their approach to enforcement and decision making, and the degree to which and in what manner they believe the cases raise troubling questions about justice and morality. *Navigators* are morally conflicted by these cases and, though they express sympathy for the poor fathers they see in court, they are also somewhat defensive about their own role and report feeling as if they themselves are in a bind. I refer to their enforcement and decision-making approach to the cases as a harm-reduction strategy because they attempt to keep the cases spinning in place to avoid imposing the harshest punishment on poor fathers who fail to pay support. *Bureaucrats* view these cases as "open and shut" and, espousing a legal formalist approach, believe that they are simply doing their job without regard to questions of moral judgment. They deemphasize the discretion they enjoy and contend that they are evenhandedly administering justice. *Zealots*, by contrast, express hypermoralistic views of the parents in child support cases and perceive the fathers uniformly as deadbeat dads. The judges and government attorneys who fall into this category view themselves as righteous child advocates and pursue an aggressive enforcement approach in order to make fathers into more responsible citizens. Finally, *reformers* have a nuanced and sophisticated understanding of the moral complexities raised in these cases. They report being troubled by what is happening to the families in their courts and, through their efforts at change, take on the role of internal reformers.

The Article further examines the models both individually and in relation to each other. I present the models as fluid groupings that show their distribution (or ways of happening) rather than their prevalence. The models' distinct characteristics help shape a critical understanding of how legal actors charged with law enforcement perceive and make sense of their role in poor people's courts.

The relevance of the four models presented here—navigators, bureaucrats, zealots, and reformers—is not limited to family court or child support enforcement. The models shed light more broadly on how government lawyers and judges likely operate in legal proceedings marked by social and economic inequality. Examples that have come to light in recent years include the epidemic of housing evictions taking place across the United States and the pattern of municipalities imposing exorbitant and burdensome fees and fines on poor residents—including for parking

and traffic violations, court costs, and more—to generate revenue for local governments and courts.⁵

Short of resigning their positions to protest and call attention to perceived injustice, how do judges and government lawyers operate in cases that present serious civil justice dilemmas? How do they make sense of eviction cases when they see a never-ending stream of local residents—many full-time, low-wage workers—lose their housing largely as a result of economic conditions outside their control? How do they handle cases where the law imposes draconian sentences on first offenders who commit low-level crimes? More broadly, what kinds of sense making do legal actors—particularly individuals responsible for law enforcement and adjudication—engage in when the rules, practices, and/or outcomes in the legal system appear manifestly unjust?

I. A SNAPSHOT OF CHILD SUPPORT ENFORCEMENT IN POOR FAMILIES

There is a consensus that child support enforcement is not operating effectively for many disadvantaged families who make up about a quarter of the public child support caseload.⁶ The national child support debt, which is staggering, continues to grow.⁷ Poor families owe the majority of the nation's child support debt.⁸ Approximately 60% of poor custodial parents are not receiving the support they need, instead getting either partial payments or no payments at all.⁹ Because child support

⁵ See Alexis Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1755–56 (2010); see also Hannah Rappleye & Lisa Riordan Seville, *The Town that Turned Poverty into a Prison Sentence*, NATION (Mar. 14, 2014), <https://www.thenation.com/article/town-turned-poverty-prison-sentence/>. See generally Margaret A. Gordon & Daniel Glaser, *The Use and Effects of Financial Penalties in Municipal Courts*, 29 CRIMINOLOGY 4 (1991).

⁶ The child support system operates effectively for nonpoor families largely as a result of federal legislative reforms in the 1980s and 1990s that strengthened and automated collections. See Tonya L. Brito, *The Child Support Debt Bubble*, 9 U.C. IRVINE L. REV. 953, 954, 960–61 (2019) [hereinafter Brito, *The Child Support Debt Bubble*].

⁷ Over the past 30 years, the national child support debt has increased by 263% to over \$117 billion. *Id.* at 954.

⁸ In their oft-cited government-commissioned study examining child support arrears in nine large states, Urban Institute researchers Sorensen, Sousa, and Schaner found that noncustodial parents who had no reported income or annual incomes of less than \$10,001 owed 70% of the accumulated debt. See ELAINE SORENSEN ET AL., URB. INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION 22 (2007), <https://www.urban.org/research/publication/assessing-child-support-arrears-nine-large-states-and-nation>. By contrast, obligors with more than \$40,000 in annual income were responsible for only 4% of the debt. *Id.*

⁹ The U.S. Census reports that in 2015, 26.7% of the custodial parents who were supposed to get child support lived below the poverty threshold. See TIMOTHY GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2015, at 12–13

represents a significant portion of their overall family income, nonpayment is highly consequential for these impoverished families.¹⁰ Poor noncustodial fathers have unrealistically large support orders in place that are—as a percentage of income—disproportionately larger than the orders imposed on nonpoor obligors.¹¹ Their inability to consistently pay the child support they owe leads to enforcement actions, including threats of civil incarceration and increasing arrears, for sometimes in the tens of thousands of dollars.¹²

For many years the academic and policy communities have written about these systemic problems and the laws and mechanisms that produce them.¹³ In recent years the national press has published devastating accounts of poor families' entanglements in the child support system.¹⁴ Indeed, the problems of poor families in the

(2018). Of these poor custodial parents, only 39.2% received their full child support payment from the noncustodial parent, 32.6% received no payments at all, and the remaining 28.1% received partial payments. *Id.* at 12.

¹⁰ For example, for the 39.2% of poor custodial parents who received full payments, the child support received amounted to 58% of their overall family income. *Id.* at 12–13.

¹¹ Federal law permits a maximum withholding limit of 50% to 65% of earnings for child support payments. See *Processing an Income Withholding Order or Notice*, OFF. CHILD SUPPORT ENFT, (May 17, 2017), <https://www.acf.hhs.gov/css/resource/processing-an-income-withholding-order-or-notice>. A 2002 federal report revealed that the child support orders of low-income obligors were, on average, 69% of their reported earnings, despite the federal limit. This exceeds the national average of 40%. Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, JUDGES' J., Winter 2004, at 5, 5.

¹² See Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 619–20 (2012) [hereinafter Brito, *Fathers Behind Bars*]; Maldonado, *supra* note 4, at 1016.

¹³ E.g., Brito, *Fathers Behind Bars*, *supra* note 12, at 619–20; Cammett, *supra* note 4, at 129–32; Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1030–34 (2007); Maldonado, *supra* note 4, at 993–96; Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 96–98 (2008); Gabriela Sandoval, *The Costs of Child Support*, POVERTY & RACE RES. ACTION COUNCIL, Mar./Apr. 2015, at 1, 2, 6; Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 933–34 (2016); see also JOY MOSES, CTR. FAM. POL'Y & PRAC., A BLUEPRINT FOR ECONOMIC SECURITY 5–10 (2017).

¹⁴ E.g., Robert Crosnoe & Elizabeth Cozzolino, *Revamp Child Support Policies*, SAN ANTONIO EXPRESS NEWS (June 14, 2017), <https://www.mysanantonio.com/opinion/commentary/article/Revamp-child-support-policies-11220477.php>; Dwyer Gunn, *Not Just a Deadbeat Dad*, PAC. STANDARD (June 14, 2017), <https://psmag.com/news/not-just-a-deadbeat-dad>; Eli Hager, *For Men in Prison, Child Support Becomes a Crushing Debt*, WASH. POST (Oct. 18, 2015), https://www.washingtonpost.com/politics/for-men-in-prison-child-support-becomes-a-crushing-debt/2015/10/18/e751a324-5bb7-11e5-b38e-06883aacba64_story.html?noredirect=on&utm_term=.b0e4dfc34b42; Raheem F. Hosseini, *Government Interest Rates Make It Less Likely for Sacramento's Low-Income Parents to Pay Child Support*, SACRAMENTO NEWS & REV. (May 1,

child support system have been acknowledged and well-documented by the federal government's Office of Child Support Enforcement (OCSE) itself.¹⁵ As such, this does not require extensive elaboration here. Instead, this Part offers a brief overview of the data and systemic practices in order to provide the relevant legal context for understanding the child support enforcement cases that I examined for this study.

The child support collection rate is low in cases involving indigent families, in part because the noncustodial parents in these families are underemployed and earn below-poverty wages.¹⁶ Empirical studies confirm that many fathers who do not pay child support are "unable nonpayers" because they are poor and have great difficulty finding and maintaining jobs that would enable them to be self-supporting and pay

2014), <https://www.newsreview.com/sacramento/government-interest-rates-make-it/content?oid=13342074>; Jennifer Ludden, *From Deadbeat to Dead Broke: The "Why" Behind Unpaid Child Support*, NAT'L PUB. RADIO (Nov. 19, 2015), <https://www.npr.org/2015/11/19/456352554/from-deadbeat-to-dead-broke-the-why-behind-unpaid-child-support>; Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), <https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html>; Lauren Sausser & J. Emory Parker, *Cost Is High to Jail Parents for Missed Child Support*, POST & COURIER, (Apr. 24, 2015), https://www.postandcourier.com/archives/cost-is-high-to-jail-parents-for-missed-child-support/article_8814a61c-2a35-58bd-92f8-f6f526feaa05.html; Elizabeth Stuart, *How Anti-Poverty Programs Marginalize Fathers*, ATLANTIC (Feb. 25, 2014), <https://www.theatlantic.com/politics/archive/2014/02/how-anti-poverty-programs-marginalize-fathers/283984/>; see also CARMEN SOLOMON-FEARS ET AL., CONG. RES. SERV., CHILD SUPPORT ENFORCEMENT: INCARCERATION AS THE LAST RESORT PENALTY FOR NONPAYMENT OF SUPPORT 13–17 (2012).

¹⁵ Indeed, in an effort to address these problems, the federal government issued new child support regulations in December 2016. See Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492 (Dec. 20, 2016) (codified at 45 C.F.R. §§ 301–305, 307–309). The new rules address several of the problems discussed in this Article, including ability to pay, income imputation, and civil contempt. Implementation at the state level will take several years. *Id.* at 93,516. The new rules primarily set forth preferred standards and criteria to guide state decision making, not firm directives. Thus, states retain nearly all of their existing discretion to decide how to handle cases involving unemployed and underemployed noncustodial parents who are behind in their child support payments. There is considerable doubt that the new rules go far enough to solve the problem of impoverished noncustodial fathers being threatened, punished, and incarcerated by the state on the ground that they are able to pay support but willfully refuse to do so.

¹⁶ See Brito, *Fathers Behind Bars*, *supra* note 12, at 646 ("About 26% of noncustodial fathers (about 2.8 million) are poor, and the vast majority of this group (approximately eighty-eight percent) does not pay any child support. These fathers earn an average of \$5627 annually." (footnotes omitted)). Another study documenting the employment status of low-income obligors found that 41% did not work during the prior year (not including obligors who were imprisoned), 34% were engaged in full-time jobs, and just 8% were working full-time year round. ELAINE SORENSON & HELEN OLIVER, URB. INST., POLICY REFORMS ARE NEEDED TO INCREASE CHILD SUPPORT FROM POOR FATHERS 7 (2002).

child support.¹⁷ Of the low-income fathers who fail to pay support, approximately 30% are in jail and the rest face significant barriers to employment, including limited education and work histories, problems with their health, limited transportation options, and insecure housing.¹⁸ According to a 2004 OCSE report, 29% of child support debtors earned between \$1 and \$10,000 and 34% had no reported earnings.¹⁹ In the academic and policy literature, they are referred to as deadbroke parents who “can’t pay” rather than deadbeat parents who “won’t pay.”²⁰ Despite their meager below-poverty earnings—wages that fall far short of meeting their own basic subsistence needs²¹—and precarious employment, poor fathers are often ordered to pay an unrealistically high percentage of their income to support their children.²²

What then explains the mismatch between court-ordered support amounts and low-income fathers’ financial means? Several systemic practices involving the establishment, modification, and enforcement of child support orders are contributing factors. First, one practice is that a significant number of child support awards are established as default orders in court proceedings when noncustodial parents do not appear for the hearing.²³ Second, child support orders are frequently calculated on

¹⁷ Brito, *Fathers Behind Bars*, *supra* note 12, at 633 n.122 (“Another study, reviewing data from the 1990 Survey of Income and Program Participation, conducted by the U.S. Census Bureau, estimated that between sixteen and thirty-three percent of noncustodial fathers are unable nonpayers.”); *see also* Ronald B. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. POL’Y ANALYSIS & MGMT. 44, 47 (1998); Sorenson & Zibman, *supra* note 4, at 422.

¹⁸ *See* Sorenson & Zibman, *supra* note 4, at 424–26.

¹⁹ THE STORY BEHIND THE NUMBERS: WHO OWES THE CHILD SUPPORT DEBT?, OFF. CHILD SUPPORT ENF’T, U.S. DEP’T HEALTH & HUM. SERVS. (2004), https://www.acf.hhs.gov/sites/default/files/ocse/im_04_04a.pdf.

²⁰ *E.g.*, Cammett, *supra* note 4, at 130; Maldonado, *supra* note 4, at 995; Mincy & Sorensen, *supra* note 17, at 46.

²¹ For example, many low-income, hourly wage workers simply cannot afford even modest housing in their communities. *See* ANDREW AURAND ET AL., NAT’L LOW INCOME HOUS. COAL., OUT OF REACH 2017: THE HIGH COST OF HOUSING 1 (2017) (“The 2017 national Housing Wage is \$21.21 per hour for a two-bedroom rental home, or more than 2.9 times higher than the federal minimum wage of \$7.25 per hour.”). Remarkably, there are only 12 counties in the United States where residents who work in a minimum-wage job earn enough to affordably rent a one-bedroom home. *Id.*

²² *See* SORENSON & OLIVER, *supra* note 16, at 5 (reporting that 28% of indigent noncustodial fathers had child support orders set at 50% or more of their income).

²³ Brito, *Fathers Behind Bars*, *supra* note 12, at 639–41; *see also* Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,530 (Dec. 20, 2016) (codified at 45 C.F.R. §§ 301–305, 307–309) (“[T]he rate of default orders were increasing inappropriately.”); REBECCA MAY & MARGUERITE ROULET, CTR. FAMILY POL’Y & PRAC., A LOOK AT ARRESTS OF LOW-INCOME FATHERS FOR CHILD SUPPORT NONPAYMENT: ENFORCEMENT, COURT AND PROGRAM PRACTICES 8 (2005). *See generally* Jane C. Murphy, *Legal*

an income level that is imputed—often on the presumption that the parent should and could obtain a stable, full-time, minimum-wage job rather than on the noncustodial parent's actual earnings.²⁴ Third, at the time an initial child support order is established, it is not uncommon for the noncustodial parent to already be deemed in debt for retroactive support dating back several years or made to repay the state for additional costs (such as birth expenses) that were previously incurred by the state.²⁵ Fourth, noncustodial parents often have child support orders in place that exceed their current ability to pay because the order was not reduced following a reduction in their earnings due to job loss or other similar circumstances.²⁶ Finally, for noncustodial parents with multiple child support orders, their overall obligation can be staggering and economically unrealistic, especially in light of federal guidelines that permit total monthly child support obligations to be as high as 65% of an obligor's pretax earnings.²⁷ The practices described above—piled one on top of the other—contribute to the child support nonpayment problem and the buildup of significant arrears by low-income noncustodial parents.²⁸

When poor dads do not pay support regularly, they are called into court in enforcement actions to answer for their nonpayment.²⁹ Unable to reliably collect support using these traditional administrative methods, the state instead commences court enforcement proceedings; these are often cyclical in that obligors experience multiple enforcement hearings for the same unpaid child support debt. Meanwhile, child support debt continues to accumulate, sometimes expanding into the tens of

Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children, 81 NOTRE DAME L. REV. 325 (2005) (detailing the ramifications of failing to appear for child support hearings).

²⁴ See JACQUELYN L. BOGGESE, CTR. FAMILY POL'Y & PRAC., LOW-INCOME AND NEVER-MARRIED FAMILIES: SERVICE AND SUPPORT AT THE INTERSECTION OF FAMILY COURT AND CHILD SUPPORT AGENCY SYSTEMS 4 (2017); MAY & ROULET, *supra* note 23, at 40.

²⁵ See, e.g., MICH. DEP'T HEALTH & HUM. SERVS., MICHIGAN IV-D CHILD SUPPORT MANUAL § 6.06, at 4 (2017); WIS. LEGIS. FISCAL BUREAU, CHILD SUPPORT ENFORCEMENT PROGRAM 15 (2007).

²⁶ See Brito, *Fathers Behind Bars*, *supra* note 12, at 643; Patterson, *supra* note 13, at 114.

²⁷ See Ludden, *supra* note 14.

²⁸ As explained more fully in one of my earlier publications, states' assessment of interest on child support debt and states' unwillingness to suspend child support obligations when obligors are incarcerated are two additional practices that contribute significantly to the accumulation of arrears. See Brito, *The Child Support Debt Bubble*, *supra* note 6, at 976–82.

²⁹ Conventional enforcement tools such as wage garnishment, liens, and asset seizure work very efficiently with noncustodial parents who have regular earnings or have assets. These methods, however, are practically useless for collecting child support from fathers without stable, consistent employment and financial assets.

thousands of dollars. When the debt remains unpaid, the state resorts to civil incarceration (or the threat of it).³⁰ Federal law requires that civil contempt only be used when the noncustodial parent can pay but is willfully avoiding that obligation.³¹ The goal of the civil contempt process is to coerce the defendant into making the payment. However, in the majority of contempt cases, the noncustodial parents' circumstances involve underemployment and below-poverty wages.

Incarceration of these fathers for child support nonpayment has been compared to the use of debtors' prisons.³² The practice is widely viewed as unfair and morally wrong because the most economically vulnerable parents in the child support system are trapped in an endless cycle in which the threat of jail hangs over them like the sword of Damocles.³³

Impoverished noncustodial parents have little or no ability to reliably and consistently pay their inflated child support orders. Because of that, they inevitably accumulate child support arrears. Their failure to pay and mounting arrears lead to a contempt-of-court ruling for "willful" nonpayment of their child support order and possibly to incarceration.³⁴ Even if they are incarcerated and eventually released, the

³⁰ Incarceration (and the threat of incarceration) through a civil contempt proceeding is commonly used as a remedy to enforce child support orders against indigent noncustodial parents. Contempt is widely understood as conduct that intentionally disobeys a court order. A finding of civil contempt for nonpayment of child support requires that an obligor was under an order of support and was able to comply with the order but failed to do so. Civil contempt is a remedial sanction that is intended to compel compliance with a court order. The underlying reasoning is that individuals who can comply with a court order will do so when facing imprisonment for their willful failure to do so. If the obligor is unable to pay the child support order (and thus did not willfully violate the order), civil contempt is not an appropriate response.

³¹ See *Turner v. Rogers*, 564 U.S. 431, 435 (2011).

³² See Patterson, *supra* note 13, at 98.

³³ See Sausser & Parker, *supra* note 14 ("Many of these men can't escape this in-and-out cycle of incarceration, said Lee Moultrie, a community activist. . .").

³⁴ The majority of states use civil contempt to enforce child support orders. Although there is limited data available concerning how often it is used, there are estimates that 50,000 parents are currently civilly incarcerated for failure to pay child support. Eli Hager, *Why Was Walter Scott Running?*, MARSHALL PROJECT (Apr. 10, 2015), <https://www.themarshallproject.org/2015/04/10/why-was-walter-scott-running>. In a recent article, sociologist Elizabeth Cozzolino, examining data from the Fragile Families and Child Wellbeing Study national data set, found that "about 14 percent [of child support debtors] go to jail for child support debt in the first nine years of their children's lives." Elizabeth Cozzolino, *Public Assistance, Relationship Context, and Jail for Child Support Debt*, 4 *SOCIUS* 1, 13 (2018). Additionally, there are a handful of studies that provide information about imprisonment at the state or regional level. For example, surveys of South Carolina determined that one in eight imprisoned individuals were there as a result of civil incarceration for nonpayment of child support. Irin Carmon, *How Falling Behind on Child Support Can End in Jail*, MSNBC (Apr. 9, 2015), <http://www.msnbc.com/msnbc/how-falling-behind-child-support-can-end-jail#56748>; see also STEVEN COOK, INST. RES. ON POVERTY, CHILD SUPPORT ENFORCEMENT USE OF CONTEMPT AND CRIMINAL NONSUPPORT CHARGES IN

child support debt does not go away but continues to mount, leaving fathers with a constant fear of incarceration because they face a seemingly endless cycle of civil contempt proceedings.³⁵

II. EXISTING RESEARCH AND THEORETICAL CONTRIBUTION

This Article engages the burgeoning scholarly literature in the field of access to justice in civil matters. Notably, scholars have not reached consensus regarding the conceptual meaning of access to justice. Two dominant strands in the research examine questions of procedural fairness³⁶ and lawyer effectiveness.³⁷ Research has also examined questions of substantive justice (understood as accurate judicial outcomes).³⁸ Other scholars have argued for a much broader understanding of access to justice.³⁹ Rebecca Sandefur rejects the common understanding that access to justice necessarily means access to a lawyer or legal services and suggests instead that access to justice can be achieved with wide and equal access to the lawful resolution

WISCONSIN 1 (2015); MAY & ROULET, *supra* note 23, at 8–9; Maureen A. Pirog & Kathleen M. Ziolo-Guest, *Child Support Enforcement: Programs and Policies, Impacts and Questions*, 25 J. POL'Y ANALYSIS & MGMT. 943, 960 (2006) (referencing findings from an Urban Institute survey of noncustodial parents as part of its Survey of Absent Parents, which determined that “13 percent of survey respondents in Florida and 6 percent in Ohio had been jailed in an effort to collect child support” (citation omitted)); Mike Brunker, *Unable to Pay Child Support, Poor Parents Land Behind Bars*, NBC NEWS (Sept. 12, 2011), http://www.nbcnews.com/id/44376665/ns/us_news-crime_and_courts/t/unable-pay-child-support-poor-parents-land-behind-bars/#.XURRji2ZNQI (referencing 2002 Urban Institute study of U.S. Bureau of Justice Statistics finding “that approximately 10,000 men were in jail for non-payment of child support, representing 1.7 percent of the overall U.S. jail population”). Similarly, there is no systematic tracking of the costs associated with civil incarceration for nonpayment of support. See *Child Support and Incarceration*, NAT'L CONF. ST. LEGIS. (Mar. 4, 2019), <http://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx>.

³⁵ Additionally, for the most impoverished parents, child support orders based on imputed income (a presumed amount that has little basis in fact) do not result in financial support for children.

³⁶ The procedural justice literature finds that when litigants perceive that they have been treated fairly in a dispute resolution process, they are more satisfied with the substantive outcome and more likely to comply with a court ruling. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 64–65 (1988).

³⁷ For an overview of this body of research, which has focused primarily on analyzing the outcomes of civil cases in an effort to gauge the overall efficacy of representation in securing positive outcomes for low-income litigants, see Tonya L. Brito et al., *What We Know and Need to Know About Civil* Gideon, 67 S.C. L. REV. 223, 237–38 (2016) [hereinafter, Brito et al., *What We Know*].

³⁸ See, e.g., Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 L. & SOC. INQUIRY 1058 (2017).

³⁹ See MacDowell, *supra* note 1, at 475; Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49, 49 (2019).

of justice problems.⁴⁰ Elizabeth MacDowell critiques the current approach to access to justice, which she argues has been more focused on access than on justice, and proposes a framework for access to justice as a counter-hegemonic practice aimed at broader social justice goals.⁴¹

This Article contributes theoretical insight into the academic debate about the meaning(s) of access to justice. Through an empirically rigorous and grounded exploration and analysis of how civil justice works in poor people's courts, this Article finds that justice is not one story, but many. State legal actors working within the constraints of poor people's courts—high-volume caseloads, unrepresented litigants, and legal claims that stem from socioeconomic disadvantage—are presented with serious civil justice dilemmas on a daily basis. The judges and lawyers handling these cases ascribe social meaning to legal problems that address poverty and inequality, and their understandings factor into the approaches they adopt. Four models of state legal actors emerge from the data—the bureaucrat, the navigator, the zealot, and the reformer—and their perspectives on and approaches to the cases they handle produce varied forms of justice for the poor people they encounter in court.

This Article also contributes to family law scholarship, specifically the growing body of work that has analyzed how the child support system operates for poor families. I highlight here five significant currents in this line of research and address the contribution this Article makes to the field. First, academics studying the origins and evolution of the child support system credit the legislative reform movements in the 1980s and 1990s, which sought to dramatically strengthen enforcement, with enacting inflexible and punitive measures that are not sufficiently responsive to poor families' economic and labor force realities.⁴² In 1996, when welfare reform was enacted, the underlying premise was that custodial mothers receiving cash assistance would be required to move from welfare to work and, in order to lift them above the poverty line, their low wages would be supplemented with child support payments made by noncustodial fathers.⁴³ Welfare reform proponents and government

⁴⁰ See Sandefur, *supra* note 39, at 51.

⁴¹ See MacDowell, *supra* note 1, at 475, 482.

⁴² See Brito, *Fathers Behind Bars*, *supra* note 12, at 624–26; Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 254–55 (2000) [hereinafter Brito, *Welfarization*]; Stacy Brustin, *Child Support: Shifting the Financial Burden in Low-Income Families*, 20 GEO. J. ON POVERTY L. & POL'Y 1, 3–5 (2012); Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 157–59 (2011).

⁴³ See Brustin, *supra* note 42, at 2. In her commentary on the new child support guideline proposed by the American Law Institute's (ALI) Principles of the Law of Family Dissolution, Karen Czapanskiy endorsed the ALI's recommendation regarding low-income parents. See Karen Syma Czapanskiy, *ALI Child Support Principles: A Lesson in Public Policy and Truth-Telling*, 8 DUKE J. GENDER L. & POL'Y 259, 267 (2001) ("The ALI guideline is clear and persuasive that raising the child support obligations of low-earning parents is inadvisable. Relying on these

policymakers failed to acknowledge and address the financial challenges faced by underemployed noncustodial fathers, large numbers of whom were unlikely to earn enough to meet a self-sufficient standard of living even before making any child support payments.⁴⁴ I also examine the political rhetoric from that time, which demonized fathers who do not pay support, and I show how competing arguments and alternative measures—such as increased public support for poor families—were drowned out.⁴⁵

Second, a number of researchers have found that child support imposes unrealistically high support obligations on low-income obligors and, when obligors fail to pay, they are doggedly pursued through repeated enforcement proceedings and increasingly harsh penalties, including jail time for nonpayment.⁴⁶ Elizabeth Patterson, for example, closely examines how the enforcement process has effectively created debtors' prisons in which thousands of poor obligors are routinely being jailed every day for nonpayment of support. In South Carolina alone, 13% to 16% of the county jail population is incarcerated pursuant to a finding of civil contempt.⁴⁷ Though civil contempt for nonpayment requires a finding that the obligor had the ability to pay and willfully violated a court order, Patterson argues that these incarcerations are unjust because many of the obligors cannot in fact pay their child support orders.⁴⁸ Their ability to pay is constrained by their limited employment and earning potential.⁴⁹

The third notable current in the research is the examination and critique of the cost-shifting goals of child support.⁵⁰ Daniel Hatcher explores the potential conflicts

obligors to pay sufficient child support to significantly raise their children's standards of living is a fiction.").

⁴⁴ See Czapanskiy, *supra* note 43, at 264–66. In his empirical study of low-income fathers, sociologist Ronald Mincy found:

Taking into account normal household expenses (e.g., rent, food, clothing, healthcare, and transportation) as well as federal, state, and other taxes, a father making \$20,000 a year with a child support obligation (for one child) of \$3,400, would have little money left by the end of the year. In fact, his income would be \$6,354 below the federal poverty line for a single person.

RONALD B. MINCY ET AL., *FAILING OUR FATHERS: CONFRONTING THE CRISIS OF ECONOMICALLY VULNERABLE NONRESIDENT FATHERS* 9–10 (2015).

⁴⁵ Brito, *Fathers Behind Bars*, *supra* note 12, at 628; Brito, *Welfarization*, *supra* note 42, at 264.

⁴⁶ See Brito, *Fathers Behind Bars*, *supra* note 12, at 651–68; Harris, *supra* note 42, at 171–72; Hatcher, *supra* note 13, at 1075; Patterson, *supra* note 13, at 96–97.

⁴⁷ Brief for Elizabeth G. Patterson & S.C. Applesseed Legal Justice Ctr. as Amici Curiae Supporting Respondents at 4, *Turner v. Rogers*, 564 U.S. 431 (2011) (No 10-10).

⁴⁸ *Id.* at 116.

⁴⁹ *Id.* at 119–20.

⁵⁰ See also Hatcher, *supra* note 13, at 1079–82; Murphy, *supra* note 23, at 331. See generally Boggess, *supra* note 24.

that arise through the government policy of seeking payback of welfare expenditures provided to custodial parents through child support enforcement against noncustodial parents.⁵¹ He argues that the reimbursement system harms children as it redirects much-needed financial resources from the family to the state.⁵² Jane Murphy's research on the link between welfare reform and fatherlessness finds that an unintended and harmful consequence of the state's interests in collecting child support has been an increase in the number of fathers who have filed court petitions to vacate orders establishing paternity.⁵³ These proceedings, known as paternity disestablishment actions, are motivated by a desire to be relieved of the legal duty to pay child support.⁵⁴ When granted, disestablishment leaves poor and vulnerable children with no legally recognized father.⁵⁵

Fourth, family law scholars Ann Cammett, Solangel Maldonado, and I have questioned the legal system's exclusive focus on noncustodial fathers' financial responsibilities for their nonresident children. This work argues in favor of increased recognition of and support for fathers' role as nurturers.⁵⁶ In her article *Deadbeat, Deadbroke, and Prisoners*, Cammett addresses how incarcerated noncustodial parents should be treated by the child support system.⁵⁷ She identifies two phenomena in the law that have had a deleterious effect on the poor children of incarcerated parents. The first is the "get tough" on so-called "deadbeat dads" political juggernaut that resulted in aggressive and punitive child support laws and enforcement practices, and the second is the national trend of mass incarceration.⁵⁸ She argues that child support reforms contributed to the development of large arrears by poor fathers and that for many such parents, the debt is so massive that it is effectively uncollectible.⁵⁹

In *What We Talk About When We Talk About Matriarchy*, I examine how the state governs the family responsibilities of poor fathers and argue that child support law, which only recognizes and credits financial payments of support, embodies and reinforces gendered notions of parental roles.⁶⁰ I demonstrate that the economic

⁵¹ Hatcher, *supra* note 13, at 1055.

⁵² *Id.* at 1080.

⁵³ Murphy, *supra* note 23, at 355–65.

⁵⁴ *Id.*

⁵⁵ *Id.* at 364–65.

⁵⁶ Tonya L. Brito, *What We Talk About When We Talk About Matriarchy*, 2013 MICH. ST. L. REV. 1263, 1289 (2013) [hereinafter Brito, *What We Talk About*]; Cammett, *supra* note 4, at 165–67; Maldonado, *supra* note 4, at 994–96.

⁵⁷ Cammett, *supra* note 4, at 127–32.

⁵⁸ *Id.* at 137–41.

⁵⁹ *Id.* at 143–44.

⁶⁰ Brito, *What We Talk About*, *supra* note 56, at 1292.

opportunity of men (or lack thereof) figures into patterns of family union and stability.⁶¹ *What We Talk About* proposes that more attention be paid to how government rules and regulations unduly constrain the capacity of families to adapt flexibly to male job loss and underemployment, particularly for families at the lower end of the income ladder.⁶² Compared to a middle-income family facing economic hardship, a poor family is not allowed the same degree of flexibility because child support laws compel lower-income families to conform to prescribed gender roles—especially the male primary breadwinner role—to the exclusion of other roles that may be more suitable or feasible for the family.⁶³

Solangel Maldonado, in *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, argues that government is misguided in its attacks on so-called deadbeat fathers who fail to make child support payments.⁶⁴ Drawing from existing empirical data on father engagement—which demonstrates that low-income, never-married, Black nonresident fathers are more involved with their children than are nonresident fathers of other races—she challenges the belief that they are not sufficiently committed to their children.⁶⁵ She posits that this mistaken view likely persists because the government only measures responsible fatherhood as formal child support payments and does not credit the types of contributions that Black noncustodial fathers often make, such as buying diapers and groceries.⁶⁶ Instead of making cash payments through the formal child support system, fathers prefer to provide in-kind contributions directly to their children.⁶⁷ Doing so allows them to interact and bond with their children, a benefit that mothers also say they value.⁶⁸

This scholarly work urges a rethinking of how child support laws impact poor families. Though the articles focus on different aspects of child support dynamics—Cammatt on the interaction of child support and incarceration, my earlier work on how gender policing embedded in the law undermines family autonomy and flexibility, and Maldonado on how the law overlooks and undervalues poor Black noncustodial fathers' paternal involvement—our proposals all center on fathers' noneconomic contributions. Cammatt proposes rethinking—at least in the context of poor families—the normative standard in family law: that all noncustodial parents must provide economic support to their children, especially in cases where noncustodial parents face significant barriers to gainful employment and are otherwise able

⁶¹ *Id.* at 1293.

⁶² *Id.*

⁶³ *Id.* at 1292.

⁶⁴ Maldonado, *supra* note 4, at 993–96, 1011–19.

⁶⁵ *Id.* at 994, 1004–08.

⁶⁶ *Id.* at 1005–06.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1009.

and willing to support their children in noneconomic ways.⁶⁹ I argue that poor families, lacking access to a fully adequate social welfare system, need at their disposal a full range of options when jobs are scarce, including the option for fathers (including noncustodial fathers) to take on a larger share of the child-rearing duties.⁷⁰ Maldonado contends that policymakers should expand their conception of what fatherhood means beyond economic contributions to include the fathers' role in raising their children.⁷¹

This Article expands and illuminates this body of literature by empirically examining how child support law is operationalized in poor people's courts, bridging the gap between the law on the books and the law in action. Courts and family law scholarship have taken an "empirical turn;"⁷² however, studies have primarily utilized a quantitative approach. Rigorous and large-scale qualitative investigations encompassing ethnographic research methods such as this study remain a rarity in legal scholarship. Ethnographic observations, unlike conventional doctrinal legal scholarship and other empirical methodologies, generate original, unique, and essential empirical data on legal proceedings in poor people's courts that are largely invisible and for which there is little accountability. Ethnographic inquiry is especially important for the study of child support and similar cases, which fail to generate a full public record documenting the processes and practices of the proceedings. In child support cases, similar to cases in other lower-level informal state courts, judges and family court commissioners consider cases in the moment as they are hearing them. With very few exceptions, they render their decisions verbally at the end of the hearing and while the litigants are still present. These oral rulings from the bench are documented in a court order that is signed, copied, and given to the parties, usually before they leave court. In the vast majority of hearings, there is no stenographer present recording the words spoken during the proceedings. Likewise, most hearings are not audio-recorded and made available for later transcription (even when the courtroom includes built-in and readily available recording technology). Many of the child support hearings we observed were deemed "off the record." The only public records of the hearing are the one-page, check-a-box court order signed by the judge and the clerk's brief typed notation on the case civil docket sheet that reports the hearing outcome. These case records are incomplete accounts in that they convey a small part of what transpires in court and lack the rich detail needed to fully examine and understand the civil justice experiences of the many low-income, unrepresented litigants who appear daily in our lower courts. Ethnographic

⁶⁹ See Cammett, *supra* note 4, at 165–66.

⁷⁰ Brito, *What We Talk About*, *supra* note 56, at 1292.

⁷¹ Maldonado, *supra* note 4, at 1016.

⁷² See Claire Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 227 (2018).

studies are thus essential to fully understanding how civil justice works in child support cases and other proceedings in poor people's courts.

Further, the analysis and findings in this Article are relevant to a general understanding of family courts and to research in this area more broadly. The legal rules that govern child support in the jurisdictions studied are analogous to those being applied in courts throughout the United States. It is reasonable to expect that state legal actors in other court systems will respond similarly to the child support cases they preside over. Similar civil justice dilemmas present themselves in child support courts nationwide, and it is likely that the state legal actors in those cases will respond as reported in this study. Put another way, the theoretical framework of this Article offers a plausible approach to explaining how state legal actors make sense of legal claims associated with poverty and inequality and perform their responsibility to administer justice in this setting. Investigating understandings and actions of state officials in lower civil courts broadens our understanding of court processes and outcomes. In particular, recognizing how legal actors conceive of their roles, perceive litigants, and exercise their discretion in child support enforcement cases informs our understanding of how decisions may be arrived at in other poor people's courts that similarly present civil justice dilemmas.

III. RESEARCH METHODOLOGY

My research team conducted a five-year qualitative study of the civil justice experiences of low-income families in poor people's courts, focusing on child support enforcement cases in two Midwestern states (referred to in this Article as State A and State B). In a series of publications, this multidisciplinary, multi-tiered project empirically examines several research questions of interest in the access to justice field, including: how having a lawyer makes a difference for low-income litigants; perspectives of judges, lawyers, and pro se litigants on the right to civil counsel; how a right to civil counsel should be implemented to ensure its effectiveness; how poverty is litigated and reproduced in poor people's courts; how legal actors and low-income litigants negotiate race and racial inequality in poor people's courts; how self-represented litigants access and utilize legal resources; and, in this Article, how state legal actors produce justice in poor people's courts.⁷³

The project began with a study of the child support laws and policies that shape the experiences of low-income families in the IV-D system. The study focused on what are referred to as IV-D child support cases. The IV-D program, which is authorized under Title IV-D of the Social Security Act, provides child support services

⁷³ See Tonya L. Brito et al., *"I Do for My Kids": Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3029–30 (2015) [hereinafter Brito et al., *"I Do for My Kids"*]; see also Tonya L. Brito, *Fathers Behind Bars*, *supra* note 12, at 657–58; Tonya L. Brito, *The Right to Civil Counsel*, 148 DAEDALUS 56, 57–58, 61 (2019); Brito et al., *What We Know*, *supra* note 37, at 225, 230–31, 237–38.

to families in the United States through a partnership between the federal government and state, local, and tribal governments.⁷⁴ As part of this partnership, the federal government provides funding to state and tribal child support agencies while the federal OCSE provides oversight and guidance.⁷⁵

This study examined the four-decade history of child support legislation and reforms that form the regulatory landscape in which low-income families are often caught up. It also analyzed the current rules and policies—both at the federal and state levels—that govern child support order establishment, modification, and enforcement, and how those rules operate when families are low-income. It reviewed the existing empirical evidence regarding the economic status and employment capabilities of disadvantaged fathers in the IV-D system, voluminous data documenting their unrealistically high child support orders, patterns of incomplete and intermittent payments, and accumulation of ever-increasing arrearages that lead inexorably to their being subject to enforcement actions for nonpayment in family court, including contempt motions that carry the threat of civil incarceration.⁷⁶ I conducted an initial study of the legal and policy patterns that shape the experiences of low-income families in the child support system. Those findings helped to guide the current study's subsequent qualitative empirical investigation of the experiences of these families in family court.

Broadly, the larger study involves an in-depth exploration of the legal processes in these cases, focusing on court interactions and examining them from multiple perspectives, and over an extended period of time. It explores the meaning people draw from legal interactions as well as the complexity of the relationship between process and outcomes. It also enhances our understanding of how attorney representation and other more limited forms of legal assistance affect civil court proceedings for low-income litigants. We selected State A and State B as research sites because each state utilizes a distinct legal assistance model that we wanted to study: the provision of full representation and the provision of legal assistance short of full representation. Within each state, we concentrated our data collection in three counties, chosen because their family courts vary in size and urbanicity while serving communities with varying levels of racial, ethnic, and economic diversity.

The actors involved in the child support cases we studied included child support attorneys, judges (and, in State A, family court commissioners), custodial parents, noncustodial parents, and, to a much lesser extent due to their relative absence, defense attorneys. Child support attorneys are government lawyers who represent the interests of the state's child support agency. Judges preside over legal proceedings and render decisions in child support cases; however, in State A enforcement actions

⁷⁴ 42 U.S.C. §§ 651–660 (2012).

⁷⁵ *Id.*

⁷⁶ Part II, *infra*, draws on these findings to provide the needed context for this Article. For a more comprehensive treatment, see generally Brito, *Fathers Behind Bars*, *supra* note 12.

are initially heard by family court commissioners. The custodial parents owed support are the petitioners and the noncustodial parents owing support are the obligors (i.e., defendants) in these cases. Defense counsel is appointed (or hired) to represent defendants in enforcement actions.

Data collection in all six counties included exploratory fieldwork, ethnographic observations of child support enforcement hearings, and group and individual interviews with legal professionals who handle child support cases as well as litigants who are parties in these cases. Our extensive exploratory fieldwork helped us understand the formal and informal policies and practices of each county and laid the groundwork for future stages of the study. We also spoke with a variety of institutional actors from various organizations central to the child support process at both the state and federal levels. I attended the annual meeting of the National Child Support Enforcement Association. The conference presentations provided valuable background information about child support enforcement policy at the national level. We spoke with administrators from state child support agencies and state public defenders' offices. We also spoke with several administrators from the federal OCSE, as well as administrators from nonprofit research and advocacy groups concerned with the well-being of low-income men. These informal interviews filled gaps in our information about the process of child support enforcement while also providing important access points for interview recruitment.

A significant component of data collection included the above-mentioned semistructured individual and group interviews in our six field sites with legal professionals involved in child support enforcement hearings. We looked to interviews with legal actors with expertise in child support enforcement proceedings to provide us with insider's knowledge on how civil justice "works" in these cases. The data generated by the interviews told us about the culture of the court system and the institutional context within which the child support proceedings occur. This data allowed us to understand how key institutional players understand their roles and decision-making processes and the mechanisms by which the provision of counsel influences enforcement hearings.

Our sampling frame initially included separate group interviews in all six field sites for each of the three types of legal professionals who routinely handle child support hearings: (1) county-level family court commissioners, (2) county-level circuit court judges, and (3) government attorneys representing the state IV-D child support agency. In each field site, we invited *all* the judges, family court commissioners, and child support attorneys who handle such cases to participate in group interviews. This approach proved effective in that it typically yielded group interviews consisting of three to eight respondents and eliminated potential issues of selection bias.⁷⁷ To facilitate discussion, individuals within the group interviews were

⁷⁷ In instances where the number of positive responses to our invitation to participate in a group interview exceeded the optimal size, we conducted multiple focus groups with that category

homogenous in regard to their professional position. Speaking with similarly positioned colleagues helped build rapport during the group interviews and encouraged participants to speak frankly about child support enforcement hearings and counsel. It also allowed us to make meaningful comparisons between the perceptions of different types of legal professionals who specialize in child support proceedings as well as between the perceptions of legal professionals who work in the six counties where we gathered data.

The interviews were guided by a protocol, with variations in the protocol to account for the unique professional role of each group participating in an interview. Our development of the protocol took into account our present understanding of the experiences of litigants in poor people's courts and the extent and effectiveness of legal assistance in child support enforcement cases, which is informed by: our expertise in child support law and practice; lengthy exploratory interviews with informants in the field; the scholarly literature in the access to justice field; and the dozens of child support enforcement hearings that we observed during the project's exploratory phase.

The interview protocol served as a starting point, but each discussion took its own course. We asked participants a series of open-ended questions about how child support cases are handled in their jurisdiction: how they define and perform their roles; their decision-making processes; the goals of the child support enforcement process; characteristics of the litigants; the "typical" child support enforcement case; how they determine an obligor's ability to pay child support; what types of evidence are offered in court on the issue of ability to pay; when and how legal assistance is provided to unrepresented obligors (and whether they accept such assistance); what tasks litigants must perform in litigating their cases; the obstacles litigants face when performing those tasks; whether self-help legal assistance resources enable litigants to overcome those barriers; and how defense attorneys shape their clients' understanding of their situations and options. These questions were followed up with probes to elicit clarifying and descriptive information.

In-depth interviews with participants from these settings permitted us to tap into the institutional values and beliefs that shaped the interactions we observed in the courtroom. They told us not only what these individuals do in their roles in the legal process but also how they perceive the litigants with whom they interact; how they deploy power in the legal process; how they relate to one another; their goals (e.g., substantive fairness, case processing, procedural fairness, etc.); and their experiences and perceptions regarding how unrepresented obligors negotiate the court process.

of legal actor. For example, in one county we held interviews with two separate groups of child support attorneys.

Our initial research plan envisioned relying on group interviews with the legal actors who handle child support enforcement cases. Group interviews were appealing in part because they were an efficient method of gathering data about the role each type of legal professional played in these hearings.⁷⁸ Each type of legal professional (judges, family court commissioners, child support attorneys) shares a particular orientation to the hearing and a work culture that varies by county. Interviewing them in county- and profession-based groups gave us an opportunity to collect data about how they, as a group, define the meaning of these hearings. The conversational dynamic of group interviews gave respondents the opportunity to agree, disagree, or elaborate on each other's claims, often adding context and detail that a researcher might not necessarily know to ask about in an individual interview.⁷⁹

Interviewing these professionals in groups also allowed us to get a sense of any group consensus or disagreement over the handling of these cases.⁸⁰ Often our respondents addressed issues related to child support enforcement that were surprising and unfamiliar to us as outsiders, particularly when respondents clarified our questions, elaborated on each other's statements, or offered counter examples. Group interviews also allowed us to examine how these individuals discuss their work with each other. Respondents often described their own decision-making practices in relation to each other, pointing out places where they felt their own handling of cases was typical or deviated from what their colleagues were doing. We were also able to get a sense of the culture of their workplace as we saw them react with indifference, empathy, or support to the statements their coworkers were making. Our ethnographic observations in court and individual discussions with legal actors in the field revealed that individual judges, family court commissioners, and child support attorneys deviate in how they approach the hearings, including how they interact with litigants (and each other) and what they consider to be credible evidence. They do so, however, within parameters. Group interviews allowed us to collect data on what they, as a group, considered to be fair and appropriate versus contentious decision-making techniques.

As the study progressed, however, it became clear that group interviews were not practically feasible for all of our participants. In one county, there was only one family court commissioner who handled the cases we were interested in, making a group interview impossible. In other instances, scheduling was an issue. In those instances, we substituted multiple individual interviews for a single group interview and used the same interview guide for both sets of data collection.

⁷⁸ Richard A. Krueger & Mary A. Casey, *Focus Group Interviewing*, in HANDBOOK OF PRACTICAL PROGRAM EVALUATION 506–34 (Kathryn E. Newcomer et al. eds., 4th ed. 2015).

⁷⁹ James H. Frey & Andrea Fontana, *The Group Interview in Social Research*, 28 SOC. SCI. J. 175, 175 (1991).

⁸⁰ *Id.*

There were distinct differences in the forms of information gathered in the individual and group interviews, and these differences enriched the data we collected. For example, respondents had more time to speak when we interviewed them individually. They had the opportunity to provide us with a more nuanced and in-depth understanding of their thoughts about handling these cases. It is likely that some respondents told us things they would not have been comfortable revealing in front of their colleagues. Individual interviews, however, did not provide an opportunity for coworkers to agree with, refute, or elaborate on each other's statements. To address this, we tried to encourage individual interview respondents to speak generally about how they thought their opinions or experiences might differ from those of their colleagues. Additionally, we took care to thoroughly document the interview experience in our field notes and to note how these experiences shaped the data collected and our analyses.

In the case of defense attorneys who represent obligors in child support cases, we determined that in-depth individual interviews were methodologically preferable to group interviews. Unlike the judges, family court commissioners, and government child support attorneys in the study, these attorneys do not work with each other on a regular basis. Because they have separate law practices, interviewing them in groups would not give us a sense of any shared culture of their workplace. Further, as our study is fundamentally interested with how counsel shapes hearings for obligors, it made sense to get as much in-depth data as possible about how these actors understand their role in the process and individually handle cases. For these respondents, we developed an extended interview guide that built on the group interview protocol.

The research plan also sought data about the experiences of litigants from their own perspectives. We also collected longitudinal data from a sample of 40 child support obligors/defendants, 20 from each of the two field sites where we conducted the focused ethnography.⁸¹ The longitudinal data included, first, conducting an initial in-depth interview of each obligor, then tracking their cases over a period of at least one year, observing any enforcement hearings that took place during that time frame, and finally conducting a follow-up interview at the end of the year. Though we were primarily interested in examining how low-income obligors navigate court processes and utilize available legal assistance measures in cases where they are pursued for nonpayment of support, we wanted to understand the role and experiences of custodial parents as well. Consequently, we also conducted in-depth, semi-structured interviews with eight child support plaintiffs. Interviews with custodial parents could better describe women's experiences and subjective interpretations of the child support process.

⁸¹ The sample was a nonprobability, purposive sample that researchers recruited from the two county courthouse field sites where we conducted the focused ethnography.

Interviews with litigants focused on learning about their family circumstances and work history, eliciting historical details about their cases, and, where appropriate, their other child support cases. This allowed us to explore: their understanding of the legal claims they confronted and the court proceedings they participated in; whether and how they prepared for their hearings; their knowledge of available legal services; whether and how they decided to avail themselves of legal assistance; their views on the effectiveness of any legal interventions that they accessed; and their impressions of the legal actors and court staff with whom they interacted. Data gathered from their interviews told us how litigants construct social meaning from their situations and their perceptions of the court process. The interviews with litigants provided an essential complement to our other data sources, which otherwise lacked the voice of pro se litigants regarding their understandings of their legal problems and how they decide to act on those problems.

The longitudinal data allowed us to examine the mechanisms through which contrasting legal assistance models influence obligors' proceedings over a one-year time span. Ethnographic observations of individual contempt hearings are unable to tell us how legal assistance models shape litigants' experiences over time, particularly when their encounters with the civil justice system were cyclical in nature. The longitudinal data collected revealed, over time, how those meanings and perceptions were being constructed, negotiated, altered, and resisted. We were able to examine the accounts that obligors gave at different points in the legal process as well as when and why their thinking shifted over time. It told us whether the legal interventions produced social change in the lives of low-income litigants—change that potentially extended beyond the contours of the immediate case.

To further contextualize the experiences of low-income litigants in family court, fill gaps in knowledge, and more fully understand the dynamics of judicial practice, we also sought interviews with and gathered data from other individuals with knowledge about the experiences of pro se litigants in child support cases, their efforts to access counsel and available legal assistance resources, and obligors' efforts to access job opportunities. We sought information from knowledgeable staff at the county courthouses in our field sites, including law librarians, court clerks, and staff who oversee programs that assist pro se litigants. The law librarian, for example, shared insights on the volume and range of pro se parties seeking services at the courthouse, the types of challenges they experienced when filing motions and other paperwork in their cases, and the existing court-based and countywide services available to self-represented litigants. In order to better understand the local labor market that obligors encountered, we also talked to staff that they interacted with at non-profit fatherhood and job assistance programs, and staff at for-profit temporary employment agencies. Finally, to better understand how the provision of appointed counsel works in child support contempt proceedings, we talked with knowledgeable staff and attorneys at the state public defenders' office.

My co-principal investigator (PI) and I primarily conducted individual and group interviews, though graduate student researchers working on the project had the opportunity to conduct a small number of individual interviews. Interviews typically lasted between one and two hours. The interviews were audio-recorded and professionally transcribed, allowing us to capture the participants' perceptions of the effectiveness of legal assistance measures in their own words. The transcriptions capture the meanings that these various groups of actors attribute to the enforcement process. They also allow for a comparison of the stated motivations, beliefs, and values of legal actors to their statements and actions during the hearings, and they highlight the understandings of the legal process that litigants bring as they navigate through them. Additionally, researcher field notes from interviews focused on describing the tone and interpersonal dynamics of the conversation, nonverbal interactions that would not be present on the audio recording, and the interviewer's initial analytical insights immediately following the interview. Finally, later in the study we conducted additional one-on-one interviews with members of the groups from whom we had earlier gathered data for the purpose of conducting member checks to test preliminary interpretations and findings and identify alternative explanations that could account for some of the dynamics we had observed.⁸²

Data collection included an extensive ethnographic study of child support enforcement adjudication.⁸³ The ethnographic component of the project revealed how parties construct social meaning in the context of a specific legal process. The study investigated the narratives and legal moves that legal professionals and litigants draw upon in coming to conclusions about whether or not a noncustodial parent has the ability to pay a support order. By seeking variety in the circumstances and processes that result in determinations of the ability to pay, the project describes the roles of various legal actors and the experiences of represented versus unrepresented litigants. The ethnographic data also reveals what actually occurs in child support court—a setting with a notable lack of transparency and accountability—which makes feasible an examination of the potential disconnect between the “law in action” and both

⁸² Individual interview member checks were conducted both with legal actors who participated in earlier group interviews and with legal actors who did not. During the period of data collection—which spanned nearly five years—there was some turnover of legal staff in our field sites. For example, in one county the three child support attorneys who participated in our group interview early in the study moved to other positions before the study was completed. Because we were conducting ongoing ethnographic observations in their child support court (as described more fully below), we became familiar with the new child support attorneys who replaced them. Likewise, the judges and family court commissioners typically served two- or three-year terms in family court before being rotated to another division.

⁸³ For a more detailed account of the ethnography conducted in this study, see Tonya L. Brito et al., *Focused Ethnography: A Methodological Approach for Engaged Legal Research*, in *FROM THE GROUND UP: LEGAL SCHOLARSHIP FOR THE URBAN CORE* 141, 143–44 (Peter Enrich & Rashmi Dyal-Chand eds., 2019).

the “law on the books” and the way legal actors and litigants describe the process to researchers.

Ethnography usually involves the researcher’s physical presence in a social setting, community, and/or people’s lives for an extended period of time. The research team utilized focused ethnography as its methodological approach when conducting the court observations. Focused ethnography, which exists along a spectrum of ethnographic inquiry, involves the examination of specific and well-defined interactions, acts, or social situations in the field and is characterized by relatively short-term field visits and intensive data collection to observe specific structured events or activities, such as courtroom proceedings.⁸⁴ Researchers situate themselves in a natural setting—the field site where people experience the issues or problem under study—and people’s actions and accounts are examined in this everyday context. The researcher sets out to: watch what happens in the field; listen to what those present say; observe how people behave in this natural setting; collect documents, photographs, and other artifacts; and ask questions of those present. The questioning can be informal *in situ* conversations or more formal interviews, or both. In short, the ethnographer aims to collect whatever data is available that sheds light on the subject of inquiry and emergent issues. The closeness and detail of this type of ethnographic fieldwork gives researchers a deep appreciation of the complexities and contradictions of socially relevant problems.

To focus more intensely on comparative sites, our ethnographic fieldwork occurred in two counties, one in State A and one in State B. Each research site comprises a busy child support docket in an economically depressed community. Researchers aimed to observe all of the legal actors who are directly involved in enforcement proceedings in each of the two sites. The team also aimed to observe the range of litigants who come before the court in child support cases. This sampling strategy captured the individuals who have context-specific experience and knowledge that is germane to the study’s areas of investigation.⁸⁵

Site visits included observations of informal negotiation processes between child support attorneys and litigants, hearings before the family court commissioners, and hearings before the district court judges. During hearings, members of the

⁸⁴ In contrast to “conventional” ethnography, focused ethnography emphasizes targeted, intensive data collection in highly specific social settings. See Gina M. A. Higgenbottom et al., *Guidance on Performing Focused Ethnographies with an Emphasis on Healthcare Research*, 18 QUALITATIVE REP. 1, 1 (2013); Hubert Knoblauch, *Focused Ethnography*, F.: QUALITATIVE SOC. RES., <http://www.qualitative-research.net/index.php/fqs/article/view/20/44> (last visited Oct. 11, 2019). Focused ethnography is set of techniques and methods that have been used to study specific contexts in a world that is increasingly socially and culturally differentiated. A focus on two field sites gave us a deep understanding of the child support enforcement process in these two counties.

⁸⁵ Prior to observation, the team identified relevant cases by examining court calendars in advance and attending hearings related to enforcement for nonpayment of child support.

research team were passive observers in the courtroom or in the family court commissioner hearing rooms. The observer role facilitated broader access by not aligning the researcher with specific individuals within the site.

During observations, researchers used a data collection guide designed to draw attention to the court processes and dynamics germane to the research questions. This guide was developed and refined during exploratory site visits. It captured elements of the courtroom environment, the specific kinds of narratives and evidence presented during hearings, and the nature of interactions between various legal actors and litigants. All members of the research team engaged in observations at both field sites, providing a foundation of shared knowledge that facilitated informed analysis of the data. In order to increase trustworthiness of the data, two researchers simultaneously gathered data during site visits. In most instances, one co-PI was paired with a graduate student research assistant for the observations. Combining and comparing the structured data collected by multiple researchers increased reliability by permitting triangulation. Researching the same phenomenon at the same time during the same historical period allowed for the research team to use their many sources of information to cross-check observations during the period of analysis.

The ethnographic component of the project also yielded valuable informal interview data as researchers frequently held *in situ* conversations with court staff while in the field, particularly in the hearing rooms and smaller courtrooms. We acted as nonparticipant observers during court proceedings and tried to be as unobtrusive as possible. Nonetheless, gaining and maintaining access to these ostensibly public settings—where, in fact, access was often overseen and regulated by administrative staff who served as frontline gatekeepers—required negotiation and ongoing communication between myself, as the lead PI on the project, and court personnel with authority to grant access.

Once access was gained, however, researchers developed amicable relations with the clerks, bailiffs, attorneys, commissioners, and judges present for the hearings. Often, during breaks between hearing individual cases, attorneys and/or commissioners talked with each other about the preceding or upcoming case and would draw the researchers into those conversations. They frequently shared their thoughts about the parties or their testimony or clarified some aspect of the proceeding. They were generally quite receptive to questions we had about how some aspect of the court process operated and why they took their positions of employment. In more formal courtrooms, judges sometimes invited us to approach the bench or join them in their chambers after a hearing or calendar call to ask if we had any questions about the cases we had observed, offer their insights, and elaborate in more detail about their judicial reasoning.

The team returned to the field sites intermittently over the course of nearly five years (four years and ten months, including earlier exploratory visits) until reaching a point of saturation. Visits ended when continued data collection ceased providing

new or useful information. In the State A county courthouse field site, the research team collectively observed for 340 hours and observed proceedings for 490 cases. In the State B county courthouse field site, the research team collectively observed for 161 hours and observed proceedings for 154 cases.

As a supplement to our ethnographic observations and interviews, we collected, reviewed, and analyzed the publicly available case file data that corresponds to the cases observed and, when available, obtained court transcripts corresponding to observed hearings. The case files allowed us to examine the longitudinal development of a case and to frame the hearing observations within the broader context of the case. The transcripts provided an account of verbatim exchanges during the hearing. We then drew on our detailed field notes to create a full picture of both verbal and nonverbal interactions during the hearing.

Reliance on interviews, field notes, case files, and documents allowed researchers to test explanatory accounts across these data sources. Using other sources of data to supplement focused ethnographic observations provided advantages regarding replicating key findings, identifying biases, and compensating for the limitations of observations alone. All names and places in this Article are pseudonyms.⁸⁶

IV. FOUR MODELS OF STATE LEGAL ACTORS

This Article examines how judges and government lawyers make sense of child support enforcement involving deadbroke dads. Here I outline four distinct models that emerged from the study's empirical data: navigators, bureaucrats, zealots, and reformers.⁸⁷

A. Navigators

The first model I identify is the navigator. This term signifies legal actors' awareness of how a case is situated in a larger context and their efforts to steer the case in a preferred direction. The term navigator was selected for this group because it describes their approach to handling these cases and reflects their effort to resolve the dilemma of enforcing support when both parents are impoverished and need financial help to make ends meet. The navigator category includes those judges,

⁸⁶ Other than removing filler sounds (such as "ums," "you knows," and "ahs") and stuttered repetitions of words, the quoted excerpts from respondents' interviews are as literal as feasible. When their statements include potentially identifying information, the text has been modified to include a pseudonym or generic descriptor in brackets.

⁸⁷ As in other legal scholarship generating categories of judges or lawyers, my initial assumption was that the data from this study would yield separate and distinct categories for lawyer respondents and judicial actor respondents. However, the patterns that emerged from the data cut across professional affiliations and, unpredictably, revealed that judges, commissioners and government attorneys shared overlapping understandings of their roles, their views of the litigants and the cases, and their approaches to enforcement of the law.

lawyers, and commissioners who express conflicted views about child support enforcement cases involving low-income fathers. On the one hand, they are understanding of the fathers' economic precarity and vulnerability. On the other hand, they see the custodial mothers as equally needy (if not more so), and entitled to financial assistance from the fathers of their children. This problem is described in the following exchange between two judges during a group interview:

Judge Chad Hooks: And, uh, and, and the noncustodial parent is making fourteen thousand dollars. The custodial parent's got two kids, and she's getting, you know, seventeen thousand dollars, so, you know, she's struggling, and so, but to me, that's the dilemma. It's how do you, you know, there's a lot of people who—.

Judge Paula Sims: 'Cause they're telling you, "Well, I have to live too rather than to pay my support," you know, the person making twelve thousand dollars and saying, well, okay, well, why didn't you pay anything? "Well, I had to pay my rent." You know, and so then you're thinking, okay, you know, now what do you do?⁸⁸

Among the legal actors in the study, navigators were most aware that full and consistent payment of child support orders by these fathers is often unrealistic. As a family court commissioner explained:

[H]ere in [County A], the issues of nonpayers are so dense. There's transportation issues and criminal histories and lack of education and difficulties with the economy and multiple obligations to multiple women, generally, and trying to get a sense of where they're fitting in terms of your boxes for—do you send them to jail, do you send them to the [Job Search Program], do you do nothing, do you kick it out the door because it's a hopeless case, and you're not spending any community resources anymore on this? Trying to get a sense of where that is going is really difficult without anybody else giving you their perceptions.⁸⁹

One child support attorney acknowledged the senselessness of pursuing enforcement actions in some cases and estimated that in five to ten percent of cases, the obligor is never going to pay anything. He said they would "like to just put [the cases] in a box somewhere . . . and forget about them."⁹⁰ That solution, however, is not an option.

Navigators' positions as lawyers and judges in this legal process place them in a severe bind. On the one hand, they are tasked to enforce politically popular laws

⁸⁸ Interview by David J. Pate, Jr. with family court judges, in County C, State A (Mar. 13, 2014) (on file with author).

⁸⁹ Interview with family court commissioners, in County A, State A (Jan. 17, 2013) (on file with author).

⁹⁰ Interview with child support agency attorneys, in County C, State A (Oct. 22, 2012) (on file with author).

that are designed to secure much-needed support for low-income single-parent households. On the other hand, they point out that many child support enforcement cases are “hopeless” because a sizable number of fathers are as impoverished as the mothers of the children. Navigators understand the limitations of the legal system, which is not well equipped to solve the legal problems of families living in deep poverty. In such cases, enforcement actions are more likely to punish these men for their poverty and to push them further into poverty than they are to result in support payments for their children. Commissioner Andrew Hendren explained that “in setting child support orders, we are at times potentially setting people up for failure” and, in reflecting on his own experience, stated: “you look back sometimes, and you say, man, we messed this guy over from day one, and now we’re continuing the process by expecting something that may not be anything reasonable.”⁹¹

Navigators negotiate the civil justice dilemmas inherent in these cases by adopting an enforcement approach that, by taking advantage of the cyclical nature of child support cases, keeps cases perpetually “spinning in place” to avoid imposing the law’s harshest penalty on delinquent fathers—that is, civil incarceration. Child support enforcement proceedings are often cyclical in that noncustodial parents experience multiple enforcement hearings for the same child support debt. The Supreme Court’s 2011 *Turner v. Rogers* decision drew attention to this phenomenon. Michael Turner, the noncustodial father in that case, was summoned to court on a Rule to Show Cause on numerous occasions and was held in contempt on six separate occasions for the same unpaid child support debt.⁹² The judges and attorneys in this study confirmed that it is not uncommon for low-income obligors to experience a similar fate, which has been described as a debtor’s prison⁹³ and a revolving prison door for indigent noncustodial fathers.⁹⁴

When navigators are involved, the cases are continued from one hearing to the next, without any real resolution and without the court ever reaching a contempt determination—which would lead to civil incarceration for nonpayment. Simply closing the cases is not an option. Child support attorneys who fall into the navigator category say they “have to keep these cases moving.”⁹⁵ They maintain that they give fathers who owe support “lots of chances” and “lots of opportunities” to comply.⁹⁶ Some contempt actions can apparently go on for years.

⁹¹ Interview with family court commissioners, *supra* note 89. He elaborated further that orders are set “at the behest of the child support agency who isn’t interested in the bigger picture” and is instead following a “mandate” that “depend[s] on their particular statistically driven agenda.” *Id.*

⁹² See *Turner v. Rogers*, 564 U.S. 431, 436–38 (2011).

⁹³ See Patterson, *supra* note 13, at 98.

⁹⁴ See Brito, *Fathers Behind Bars*, *supra* note 12, at 634; Robles & Dewan, *supra* note 14.

⁹⁵ Interview with child support agency attorneys, *supra* note 90.

⁹⁶ *Id.*

As long as the father is showing any semblance whatsoever of compliance, navigators can work around the law. Primarily, as long as the obligor is “making an effort” and demonstrates compliance with the requirements imposed by the child support lawyer and/or court, then the case is held open and the contempt decision is deferred. Compliance takes many forms. It may consist of making partial payments on the child support obligation, participating in work search activities, completing the required paperwork, showing up at hearings and voicing sincere efforts to find a job, and so on. At subsequent court hearings, the court reviews whether the individual has complied with the job search requirements or has made payments on the child support debt. If he demonstrates even minimal compliance, then the case will be continued for another period—maybe three months, maybe six months, maybe longer—and in the meantime the status quo is maintained and a resolution of the enforcement action is further put off. Even a partial payment of the child support debt will “save” the father for a while.⁹⁷ According to child support attorneys, minimal payments of just five dollars are sufficient because “that’s better than zero.”⁹⁸

Navigators adopt this enforcement approach in part to avoid being implicated by their role in potentially unjust enforcement proceedings brought against poor fathers who do not have the jobs or money to pay support. These judicial officers and child support lawyers possess an acute sense of their individual responsibility and were somewhat defensive. They were the only group of legal actors to express concern that their actions in this legal process would be misperceived as unfair. Repeatedly, they emphasized that they are not out to get noncustodial fathers and, in fact, are trying to help keep them out of jail. According to one child support attorney, “I’ve had people say, ‘You just want me to get in jail or something,’ and I try to explain, no, actually not. . . . We’d rather not. . . . I try to keep you out of jail.”⁹⁹ Similar to the child support lawyers, a commissioner asserted that “jail is never . . . a preferred remedy.”¹⁰⁰ Commissioners claim they too bend over backward to give fathers every opportunity to take steps to secure a job and make payments on their arrears.

What is significant is that navigators’ effort to work around the law, and thus preserve their self-image as fair and humane, is contingent on fathers doing their part. According to the child support lawyers, they (the lawyers) are doing everything they can. It is up to the fathers to do their part, but they often fall short even though the attorneys seem to be pleading with them to “help me help you.” One child support attorney explained, “I even tell them sometimes, give me *something* to hang

⁹⁷ Interview by David J. Pate, Jr. with child support agency attorneys, in County A, State A (Dec. 18, 2012) (on file with author).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Interview with family court commissioners, *supra* note 89.

my hat on.”¹⁰¹ Over and over again, the child support lawyers expressed frustration and exasperation at the perceived failures of fathers to do more on their own behalf.

Navigators pursue a form of justice that, for them, resolves the moral dilemma posed by child support enforcement in poor families. This approach—which I refer to as a harm-reduction strategy—avoids incarcerating poor fathers who lack funds to pay support but, unfortunately, leaves in place the mechanisms that lead to inordinate debt accumulation. This form of justice—essentially maintaining the status quo by spinning the case indefinitely—is no viable solution for the parties involved in these cases. This half-measure has serious consequences for noncustodial fathers. While they avoid unwarranted jail terms, their unrealistic and inflated child support orders remain in effect. Their debt continues to grow, they will experience repeated Order to Show Cause hearings, and the threat of civil incarceration persists.

B. Bureaucrats

The second model I identify is the bureaucrat, borrowing from the popular conception of a certain type of government official—often low-level front line workers—who are perceived as unthinking and unfeeling functionaries who strictly follow the rules without concern for the human consequences. Rule-worshiping civil servants are viewed as cold, rigid, and unresponsive. And the individuals who interact with them complain that they have been treated in an impersonal and indifferent manner. The government lawyers, judges, and family court commissioners in the bureaucrat category fit into many of these characterizations, especially with regard to how they perceive the child support cases they handle.¹⁰²

Bureaucrats describe their enforcement approach in a mechanistic manner. They characterize child support proceedings as “open and shut” and that their role when establishing orders involves simply applying percentages mandated by state

¹⁰¹ Interview with child support agency attorneys, *supra* note 90.

¹⁰² Other socio-legal scholars have used the street-level-bureaucracy theoretical framework to study the practices of judges and other legal professionals. See generally MICHAEL LIPSKY, STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980). For example, in Vicki Lens’s qualitative study of administrative law judges presiding over public welfare hearings, she similarly finds that some judges take a bureaucratic approach to decision making “by focusing on process and the rote application of rules.” Vicki Lens, *Judge or Bureaucrat? How Administrative Law Judges Exercise Discretion in Welfare Bureaucracies*, 86 SOC. SERV. REV. 269, 288 (2012). Comparing trial judges’ practices in family courts in France and Canada through in-depth case studies, Emilie Biland and Helene Steinmetz find that French judges more closely conform to the street-level bureaucrat model than do their Canadian counterparts. See Émilie Biland & Hélène Steinmetz, *Are Judges Street-Level-Bureaucrats? Evidence from French and Canadian Family Courts*, 42 L. & SOC. INQUIRY 298, 321 (2017); see also Dave Cowan & Emma Hitchings, “Pretty Boring Stuff”: District Judges and Housing Possession Proceedings, 16 SOC. & LEGAL STUD. 363, 363 (2007) (finding that judges in housing possession proceedings utilized a client-processing mentality comparable to street-level bureaucrats).

guidelines that leave little discretion to legal actors. "It's pretty standard. I mean, the legislatures pass guidelines. We apply the guidelines," said one family court commissioner. One commissioner explains that he is not allowed to take a party's personal circumstances into consideration unless the party has multiple orders. For serial payors, each child receives a different amount of support depending on birth order.¹⁰³ Beyond that, however, commissioners can only base support orders on monthly income. "It doesn't matter how much you're seeing the kids," said one commissioner to a father.

In the view of bureaucrats, the mechanistic approach applies even when they are enforcing orders for past-due support. Commissioner Greg Durand described his approach during enforcement hearings as being simple, with the case outcome dictated solely by one question—whether or not the defendant has paid the child support order. "[W]e're here today just to talk about are you paying X? Because that really is the only question that we're discussing that day."¹⁰⁴ Judge John Green expressed this view most emphatically and succinctly. He contends that contempt proceedings are relatively straightforward and, "it's not going to help if they have a lawyer or not." He explained, "if they're not paying, they're not paying. Those are the facts. And this is one of the areas, I think, in family court where it's black and white." The legal issue at hand is easy to resolve, according to this judge: "Did you pay it? No. Is there any record of it? No. Then you're in violation of the order."¹⁰⁵

Some bureaucrats cast a positive spin on the mechanistic approach they take to enforcement, portraying their purported lack of discretion as preventing unfairness by requiring that they evenhandedly apply inflexible rules. They claim that they are just following the rules and applying them evenly. For these bureaucrats, who perceive child support as the straightforward application of the guidelines—a simple percentage of income calculation—their lack of discretion is a valuable means to prevent bias and unfairness. This conception of how judges and lawyers produce justice in child support enforcement emphasizes fairness, the notion that similar cases will be treated similarly, and outcomes will not be affected by bias—whether it is in favor of or against individual litigants. Put another way, eliminating discretion from decision making promotes uniformity and predictability in outcomes.

¹⁰³ Tonya L. Brito, *Complex Kinship Networks in Fragile Families*, 85 FORDHAM L. REV. 2567, 2574 (2017) ("[W]here a noncustodial parent is responsible for paying multiple child support orders because he has children with more than one partner, specialized serial family guidelines provide the mathematical formula used to calculate the amount due under each individual order.").

¹⁰⁴ Interview by Chloe Haimson with Greg Durand, Family Court Commissioner, in County A, State A (June 2, 2016) (on file with author).

¹⁰⁵ Interview with John Green, Family Court Judge, in County A, State A (June 2, 2013) (on file with author).

In their narratives about child support cases, bureaucrats, unlike the other three categories described in this Article, tend not to acknowledge the civil justice challenges of child support enforcement in very poor families, nor do they use moral language when discussing the cases or parties. Instead, bureaucrats project a significant degree of professional distance, if not outright indifference. Bureaucrats do not offer positive or negative judgments about single-parent custodial mothers, whether it is to deride them for not raising their children in a two-parent household or to praise them for their effort to provide for their children all on their own. Also absent from their narratives is any apparent understanding of the barriers that poorly educated, low-income fathers face with finding financially stable employment. Likewise, even in cases involving noncustodial fathers who have multiple child support orders for the several children they have had with different mothers and who have accumulated tens of thousands of dollars in arrears—fathers who most closely resemble the stereotype of the irresponsible, shirking deadbeat dad—bureaucrats maintain their neutral and dispassionate manner.

The story bureaucrats tell is that the cases are “open and shut,” “cut and dried,” and “black and white,” so much so that justice would not be better served by appointing attorneys to represent low-income obligors. Defense counsel would not, in their view, impact outcomes simply because the fathers who are behind in their child support payments have no credible defense to assert. “A lot of times, for contempt cases and for straight child support cases, having a lawyer is not overly essential because it’s math, and the math comes out the same way whether a lawyer is sitting there or not,” explained one commissioner. In the bureaucrat’s view, because the statutes are clear about how to calculate support orders, there are few ways an attorney could argue his or her way into a lower support order. When obligors owe child support, have not been paying, and have the ability to pay, there is not much the defense can do to justify a lower support order. When making this point, attorney Sharon Edwards asserted, “it’s pretty clear-cut what’s going to happen here.”¹⁰⁶ In essence, the claim is that there is a futility to the appointment of counsel because these are loser cases and the lawyer cannot manufacture a defense. In these circumstances, in their view, defense attorneys could do nothing to help their clients.¹⁰⁷ One child support attorney evaluated the need for counsel even more frankly: “It would be a waste of money.”

With these narratives, bureaucrats attempt to erase their role in meting out justice to the low-income, pro se fathers in their courts. The outcome of the case is inevitable and—even were defense counsel made available—unavoidable. Bureaucrats too have no choice; the law dictates the result. “We’re directed by statute as to

¹⁰⁶ Interview with child support agency attorneys (Group 1), in County B, State B (Jan. 30, 2015) (on file with author).

¹⁰⁷ Remarkably, some defense attorneys echo this sentiment. “If you owe the money, I can make all the excuses in the world that I want, you know, with that,” explains one defense attorney.

how to set the amount of child support,” said one judge. As such, bureaucrats characterize their role in the legal process as one that is *de minimis*, practically ministerial. Even though they are the government attorneys pursuing the cases and the judges and commissioners deciding the cases, they nonetheless downplay their decision-making agency in the proceedings. “My hands are tied” is a phrase they commonly used to describe their lack of discretion. Bureaucrats minimize their role in these “open-and-shut” cases and, in so doing, absolve themselves of responsibility for any questionable outcomes.

Bureaucrats’ narratives about their decision-making authority under the law and how they handle child support cases do not hold up, however. There is a mismatch between the applicable law—which allows for a considerable degree of discretion in setting and enforcing orders—and bureaucrats’ claims about the law’s rigidity. Indeed, the child support guidelines in all 50 states allow for flexibility when setting orders. Although the guideline calculation is presumed to be the correct amount of child support, the court has discretion to deviate up or down from the guideline amount when it determines that the order amount is “unjust or inappropriate.”¹⁰⁸ There are many grounds upon which a deviation is permissible, including factors such as high-income obligor, low-income obligor, children from previous or subsequent relationships, a parenting time deviation, adjustments for older children, and if the parties have come to an alternate agreement. According to the National Conference of State Legislatures, overall, states use more than 40 deviation factors.¹⁰⁹

The other legal professionals in the study confirmed that setting support orders involves some discretion on their part. Though the guidelines calculate the presumed order amount, they maintain the authority to deviate from the guideline calculation. According to Commissioner Mark Baker, “We start with the underlying premise that I’m supposed to follow the support standards, unless somebody can convince me I should be deviating upward or downward with establishing support.”¹¹⁰ When asked about the areas and the degree to which he felt he could exercise discretion, Commissioner Durand elaborated: “[W]e’re allowed to take into account, basically all of the factors we want to look at. . . . [A]nd we’re supposed to start with a percentage, but we’ve got a fair amount of leeway in either direction to

¹⁰⁸ LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 8.01 (2010) (“An award is ‘unjust or inappropriate’ when the circumstances in the case are not aligned with the economic assumptions that form the basis of the guidelines.”).

¹⁰⁹ *Child Support 101.2: Establishing and Modifying Support Orders*, NAT’L CONF. ST. LEGISLATURES (Mar. 19, 2014), <http://www.ncsl.org/research/human-services/enforcement-establishing-and-modifying-orders.aspx#DeviationsNational>.

¹¹⁰ Interview with Mark Baker, Family Court Commissioner, in County C, State A (Mar. 26, 2013) (on file with author).

raise it or lower it based on the circumstances that we see.”¹¹¹ Child support attorneys likewise acknowledged that the law governing establishing orders allows for considerable discretion. With respect to the grounds for deviating from the guideline calculation, the statute provides “a laundry list of factors,” said child support attorney Ariel Whiting.¹¹² “And the last one,” she continued, “I think, is a catch-all. I love catch-all’s because you can really deviate based on what the real situation is.”¹¹³

Legal professionals must exercise even more independent judgment when making decisions regarding the enforcement of child support orders and, ultimately, whether to enter a contempt judgment. Contempt itself involves “a three-part question. Is there a court order? Are you following it? If the answer is no, is your failure to follow it willful and intentional?”¹¹⁴ In order to reach a finding of willfulness, the court must determine that the parent had the ability to pay the child support order.¹¹⁵ The lawyers and judges in the study reported, however, that it would be “refreshing” to see a straightforward case of willful nonpayment of support. Commissioner Andrew Hendren echoed the sentiments of many of the lawyers and judges in the study when he said: “[W]e rarely get a case that’s clearly contempt, where a guy is working and not paying.”¹¹⁶ Instead, they see enforcement cases with poorly educated fathers who have histories of precarious employment, typically low-wage jobs, temp jobs, cash jobs, and seasonal jobs, mixed with periods of unemployment and, in some cases, incarceration. In these circumstances, it is more challenging to assess whether the father had the ability to pay the support due and, thus, that his failure to pay was a willful violation of the court order.

Consider a common scenario in child support enforcement: the noncustodial father is summoned to court on an Order to Show Cause for why he should not be held in contempt for failure to pay his support order. The father appears and reports that he previously had a temp job and is now unemployed. The court directs the father to undertake a work search effort and to keep a job search log showing that he looked for a specified number of jobs per week. The judge schedules a subsequent review hearing and the father appears at that hearing with (or without) the log and

¹¹¹ Interview by Chloe Haimson with Greg Durand, Family Court Commissioner, *supra* note 104.

¹¹² Interview by Rachel Johnson with Ariel Whiting, Child Support Agency Attorney, in County A, State A (May 19, 2016) (on file with author).

¹¹³ *Id.*

¹¹⁴ Interview by Chloe Haimson with Greg Durand, Family Court Commissioner, *supra* note 104.

¹¹⁵ See *Turner v. Rogers*, 564 U.S. 431, 436 (2011).

¹¹⁶ Interview with family court commissioners, in County A, State A (Jan. 17, 2013) (on file with author).

reports that he is still unemployed. If the father has not located a job, the commissioner or judge will assess whether or not the father exerted sufficient effort to look for a job.

When asked how they determine whether or not a case should be certified for contempt, the predominant response from judges and lawyers was, "It depends." Legal actors indicate that they have a range of choices that are not constrained by clear rules or guidelines. They point to a multitude of factors they can consider and cite the unique facts of each case. The decision regarding how long to continue a job search order also seems to be characterized by wide discretion as there are no clear guidelines that structure how many times a job search is ordered and judges and family court commissioners vary in what they think is appropriate. They have discretion over the amount of time that obligors have to obtain a job after they issue a work search order. Some will impose a timeframe of 60 or 90 days. Some keep it going indefinitely. Judges also have discretion over whether to sentence obligors to 10, 30, or 60 days in jail or to give them work release and electric monitoring (release from prison to work). Some commissioners send obligors who appear illiterate to a literacy center and order them to sign up for classes instead of a job search.

Bureaucrats' assertions about child support enforcement reflect, at best, their prescriptive view that such cases should be decided in a legal formalist manner; in actuality, judicial reasoning is not mechanical, case outcomes are not obvious, and normative considerations of morality and legal philosophy routinely factor into decision making. The child support rules invite discretion because the rules themselves are sufficiently ambiguous that they lend themselves to various plausible interpretations. In-court ethnographic observations reveal what legal actors really do and show that the rules are operationalized in a variety of ways. For example, when making contempt decisions, many legal actors will take into account the father's payment history. What was the timing of the prior payments? Were they made on time or were the payments made on the eve of court hearing dates? They will look at whether the father is currently making partial payments. If so, how much is he paying and where is the money coming from? From cash side jobs? From family members? From his current girlfriend or wife? Does he have a car? Does he have a cell phone? Who is paying his cell phone bill? They will examine the father's appearance and dress. Does he look poor? Is he wearing nice clothes and expensive shoes? How did he pay for those tattoos? Does he look, to them, like he is able-bodied? These uses of discretion are, of course, normative or value-laden. Child support law does not dictate one right answer to this legal issue. Questions such as this call for moral or political judgment.

Further, bureaucrats' claims that a mechanistic application of rigid legal rules produces more just outcomes is undermined by the reality that there is variation in outcomes from one hearing room to the next. The research team's hearing room observations confirmed the indeterminacy in outcomes, as did the blatant assertions

of the legal actors in the study. “One of the beauties of having multiple commissioners is that you just can’t plug in a number and get answers,” said one commissioner, commenting on the power and wide discretion that commissioners have. Another commissioner went so far as to use the unpredictability of outcomes to threaten a father appearing in court, telling him: “[O]n September thirtieth the judge will be new and a lot of time, they’re a lot tougher when they first come to family court, so keep that in mind.” He was implying that judges exercise their discretion in ways that produce either harsher or more lenient rulings.

Why then are bureaucrats committed to a picture of child support enforcement adjudication (at least as a normative ideal) that involves mechanical legal reasoning that leads to one and only one outcome? Their “open-and-shut” rhetoric is a way to veil the discretionary choices they are actually making. Sometimes it appears that bureaucrats cite “the facts are the facts”—that is, their legal requirement to adhere to a strict formula to set support orders—to provide emotional distance from the situation unfolding in their courts and absolve themselves of responsibility.¹¹⁷ The law dictates how the commissioner can set support orders, and she avoids engaging with the question of how the child support enforcement system might harm the poorest fathers. She can institute some emotional distance from the challenging moral issues presented in court by “blaming the system” of child support regulations. Such emotional distancing allows legal actors to remove themselves from potential conflict and blame their decisions on rules out of their control. This view sharply contrasts with defense attorney Lindsey Ferguson’s description of child support as an “emotional area of law.” At the same time, however, Ferguson seems to recognize that the child support enforcement system sanitizes court processes of emotion through “the facts are the facts” when she explains that she takes the emotion out of legal proceedings through her representation of defendants.

C. *Zealots*

The third category is zealots, which includes the judges and lawyers who take an aggressive and responsabilizing approach in child support enforcement actions. Social scientists define responsabilization as a governing strategy of the neoliberal state “to make citizens self-responsible and independent from the welfare state.”¹¹⁸ Zealots conceive of their role as righteous child advocates working on behalf of hard-

¹¹⁷ Lipsky points out that, as a protective measure, street-level bureaucrats deny their discretion. LIPSKY, *supra* note 102, at 140–56. Doing so protects them from personal blame and from having to make difficult decisions. See Interview with family court commissioners, *supra* note 89.

¹¹⁸ Rasmus Hoffman Birk, *Making Responsible Residents: On “Responsibilization” Within Local Community Work in Marginalized Residential Areas in Denmark*, 66 SOC. REV. 608, 608 (2017).

working single moms and their needy children to extract much-needed child support from mendacious and irresponsible fathers who must be responsibilized into compliance.

Like the bureaucrats, the lawyers and judges who fall into the zealot category do not view these cases as raising serious civil justice issues and express no qualms about their roles. They tend to see the cases as one-sided in the sense that they characterize all fathers who have not paid child support as deadbeat dads. For them, there is plainly only one correct outcome when a custodial parent has not received the child support she is owed and, in their view, the noncustodial parent is unjustified in withholding support. In these circumstances, the zealot unhesitatingly subjects the fathers in their courtrooms to aggressive enforcement and threats of civil incarceration to coerce them into complying with their parental responsibilities.

Although zealots view child support cases through a moral lens, they do not acknowledge the nuance or complexity of child support enforcement in very poor families. The stories they tell about child support cases are hyper-moralistic tales that embody classic yet simplistic “good guy” and “bad guy” narratives. Their perception is that child support enforcement cases are heavily one-sided in the “worthy” custodial mothers’ favor, and that they are “doing good” by pursuing support from “deadbeat dads.” This view is reflected in the morally laden and vastly differing words they use to describe the mothers and fathers they see in court.

Zealots praise low-income custodial mothers and speak of them in exalted terms, often detailing the hard work and sacrifice involved in raising children on their own without financial help from the father. Child support attorney Shirley Hardy offered: “It’s hard to be a single mom, you know.”¹¹⁹ She elaborated: “She gets tired. She’s taking time off of work. She’s got to keep coming back to court. . . . [S]he’s the only one supporting the child.”¹²⁰ Judge Bill Salmons similarly discussed the day-to-day struggles of custodial mothers: “When you have a custodial parent who has one, two, three children, and she has to find a way to make sure that these kids eat, they have a place to live, and she’s hustling doing whatever, you know.”¹²¹ One judge recounted a typical single mother’s court testimony as follows:

I’m working three jobs right now to make ends meet. I have these three children, and I don’t get to say I don’t have a job when they’re looking at me to put dinner on, you know, on, on the table and get them to school and make sure they have lunch money.¹²²

¹¹⁹ Interview by Garrett Grainger with Shirley Hardy, Child Support Agency Attorney, in County B, State B (Feb. 27, 2015) (on file with author).

¹²⁰ *Id.*

¹²¹ Interview with family court judges (Group 3), in County B, State B (Mar. 21, 2014) (on file with author).

¹²² Interview with family court judges (Group 1), in County B, State B (Apr. 17, 2014) (on file with author).

Zealots' high regard for custodial mothers who are owed support is set against their comparatively low regard for fathers who owe that support. These fathers are, in their view, deadbeats who are evading their moral and legal obligations to support their children. In interviews, zealots frequently defined fathers owing support as lazy, irresponsible, conniving, and untrustworthy. Child support attorney Jeremy Poole related stories of noncustodial parents providing inaccurate paystubs that misrepresented their annual earnings to obtain low support orders. This story prompted child support attorney Jeffrey Yedinak to throw his hands in the air while loudly proclaiming, "They know exactly what they are doing."

In short, in the view of zealots, single mothers are "desperately in need"¹²³ and deserving of aggressive enforcement measures against delinquent fathers who can and should be doing more to provide for their children. Considering the Herculean efforts undertaken by mothers to provide for their children, zealots have little patience for the labor market challenges and economic disadvantages poor fathers face. Zealots acknowledge but then quickly dismiss the poverty and barriers to employment faced by the fathers in their courtrooms. For them, fathers' claims of poverty, homelessness, and joblessness are mere "excuses." Several attorneys mentioned that they were suspicious when litigants defined themselves as indigent, and considered unemployed and underemployed fathers to be lazy. For example, child support attorney Sharon Edwards stated, "I'm suspicious of people who say they are indigent. . . . To me, indigent is a word that means you aren't looking [for a job]." Zealots perceive the fathers appearing in their courtrooms as morally deprived and untrustworthy rather than economically and socially disadvantaged. These assumptions prevent zealots from empathizing with noncustodial parents and from understanding how the noncustodial parents' personal circumstances might impede workforce participation and the ability to reliably pay child support.

Zealots' narratives about so-called deadbeat dads are supported and justified by what I refer to as their "gotcha" stories, the exciting and satisfying tales they recount of having caught a father in a bald-faced lie concerning his inability to pay support. When describing such stories, zealots often focus on fathers' glaring efforts to evade child support by concealing their income or assets. Child support attorney Wagner shared that, in one of her cases, a mom brought in a picture that had been posted on the father's social media account of their baby in a crib full of money as evidence that the baby's father had been evading payment. Child support attorney Earl St. Pierre told of an obligor who pretended to be a college student "to the point of having the [fake] enrollment letters and everything else."¹²⁴ Child support attorney Shirley Hardy brought up the obligor who would post photos to Instagram "holding

¹²³ Interview by David J. Pate, Jr. with child support agency attorneys, in County C, State B (Mar. 10, 2014) (on file with author).

¹²⁴ Interview with child support agency attorneys (Group 1), in County B, State B (Jan. 30, 2015) (on file with author).

fifty-thousand-dollar necklaces” or “wads of cash.”¹²⁵ In a different group interview, child support attorney Connie Berg saw an obligor who had three cars—a Hummer, a Mercedes, and a Smart Car—and yet was paying only 50 dollars per month in child support.¹²⁶ When one attorney would tell a “gotcha” story, other child support attorneys present in the group interview often nodded enthusiastically and laughed, demonstrating their collective knowledge of these tales and shared delight that a father’s outrageous lie had been exposed.

The meanings zealots ascribe to mothers and fathers in child support enforcement cases guide how they handle the cases. Zealots construct themselves as “white hat” good guys who are seeking justice for poor single-parent mothers and their children. Zealots define fathers in a negative light, expressing that they have a poor attitude, lack motivation, are gaming the system, are responsible for their predicament, and, importantly, that they should and could *do more* to find a job and pay support. As shown in the following attorney’s interview, there can be personal judgment amid concerns that things are being made too easy for obligors:

A lot of our parties, they don’t want to accept responsibility for what they do and where their lives are going. And I think sometimes we make it too easy for them not to do that. And so we may get a public defender available to them. Well, that’s something I have to do. Somebody’s not necessarily doing it for me. They come into court sometimes with an attitude, “What are you going to do for me?” Well, if you’re not going to help yourself, there’s not much I can do for you. But, and that’s the problem. I think there’s just this atmosphere of not wanting to suck it up and try to make, try to get out of being in contempt. Figure out what you’ve got to do not to go to jail. It takes some work, and they’re not always willing to do it. And that’s a frustration I’ve had for twenty-plus years.

According to zealots, these fathers are evading their obligations to support their children and are likely to do so until lawyers and judges prod and threaten them. Thus, child support contempt proceedings and threats of incarceration are seen as necessary mechanisms for the state to exercise control over the lives of poor men to make them take personal responsibility for the financial needs of their children. For example, judges who fall in the zealot category engage in paternalistic in-court lecturing of low-income fathers about their economic duties to their children while threatening them with jail time if they fall short. With this approach, zealots use the mechanism of the state to advance their goal of transforming these men into “responsible” fathers and citizens.

There is alignment between the bureaucrat and the zealot, neither of whom acknowledges the civil justice dilemma of child support enforcement. Instead, these

¹²⁵ *Id.*

¹²⁶ Interview with child support agency attorneys, in County A, State B (Feb. 25, 2014) (on file with author).

are easy cases and the outcome is clear. For the bureaucrat, mothers should prevail because fathers owe support and have not paid. There is an order to pay support. The father did not pay, so he violated the court order. There is no defense—open and shut, plain and simple. Like the bureaucrat, the zealot sees the cases as easy. However, for them, the cases are not only open and shut, they are also morally one-sided. Where the bureaucrat is dispassionate and passive, the zealot is emotionally engaged and self-identifies as an advocate for needy mothers and children. They each fail to see or acknowledge the civil justice implications of pursuing child support from impoverished fathers.

D. Reformers

The fourth model is the reformers: those state legal actors who use their position within the civil justice system to pursue change and hold other legal actors accountable. Reformers were rare; only two such individuals were identified in this study: Judge Roland Cartwright, a family court judge, and Ariel Whiting, a child support attorney. Cartwright challenged government lawyers' lax handling of the cases in his courtroom and said he now requires that they meet their evidentiary burden under the contempt standard. Whiting, for her part, attempted to persuade colleagues in her office to take account of child support litigants' poverty and has even questioned them about the differential treatment litigants receive depending on their race.

The primary way Judge Cartwright sought reform in child support proceedings was by placing the burden of proof exactly where it belongs: on the state. He explained that the state gets involved with child support enforcement to reimburse itself for the custodial parent's public assistance, and it needs to do a better job of proving why cases are at the point where the state felt the need to file for contempt. He repeatedly expressed dissatisfaction with the state's attempts to meet its burden of proof, contending that it needs to develop more sophisticated arguments. "If you're going to take the time and effort to bring these actions, then have the evidence that you need," he insisted.¹²⁷

The judge did not approach contempt cases with this outlook from the beginning. "When I started out in the family division, I would do a lot of the heavy lifting, so to speak," he said, explaining that he would ask child support obligors why they had not been paying.¹²⁸ "I've recognized that it is the state's case, and it's the state's burden, and contempt is a pretty serious thing," he explained.¹²⁹ With contempt cases, "I think they [i.e., the state] should be held to, to the duty of meeting their

¹²⁷ Interview with Roland Cartwright, Family Court Judge, in County A, State A (May 22, 2017) (on file with author).

¹²⁸ *Id.*

¹²⁹ *Id.*

burden of proof," he said.¹³⁰ "I'm not going to do the heavy lifting for them. You know, they're, it's the state that's asking me to find someone in contempt and potentially incarcerate them, and they'd better darn well."¹³¹ In other words, if the state is asking him to find an obligor in contempt, it should have to prove its case. The state must provide, first, proof that the parent is not paying or evidence of noncompliance. Second, it must present the reason why the obligor should be paying. "You say that they, that there's no legitimate excuse or justification. How? And you tell me why it is that they should be able to pay," contended the judge.¹³²

Cartwright's insistence that the state's attorneys meet their burden of proof is significant. Researchers have found that the informality of lower courts, especially in situations where parties are unrepresented, contributes to courts not following their own procedural rules.¹³³ This practice can disadvantage low-income, pro se litigants, especially in cases where there is an asymmetry of representation, such as IV-D child support cases. Researchers studying the effects of representation have found that one benefit of litigants having representation is that lower informal courts are more likely to abide by procedural rules when a lawyer is present.¹³⁴ In holding the child support attorney accountable to the duty to meet the legal standard of contempt rules, the judge is to a degree compensating for the absence of representation for the individual obligors in his court.

Whiting reported that she sometimes observed that child support litigants received differential treatment in court depending on their race. As an example, she described two consecutive hearings before the same family court commissioner in which she noticed that race played a role in how the court handled the case. In one case, both parents were White and both were represented. Though the noncustodial father initially claimed to have no income, Whiting presented information that he had claimed \$38,000 in business expenses. Nevertheless, the commissioner agreed to hold open the case, providing the father with additional time to make a payment on his child support debt. She thought that the obligor was at an advantage in the case because both he and his attorney were White men, and the court was lenient even though the state produced evidence that the father had misrepresented his earnings.

She recounted what happened in the next case, in which both parents were Black and unrepresented. She explained that the noncustodial father in that case earned an income of \$15,000 to \$20,000 annually. Despite the fact that the parents

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *E.g.*, Annie Decker, *A Theory of Local Common Law*, 35 CARDOZO L. REV. 1939, 1979 (2014).

¹³⁴ *E.g.*, *id.* at 1979–84.

were on good terms and were trying to co-parent their child, the commissioner declined to order shared placement. Instead, he ordered primary placement with the child's mother. Whiting felt that because the litigants were people of color, the commissioner was unwilling to put in the effort to reach a viable shared placement schedule. She elaborated, "rather than trying to get into, 'Well, what the, what would that schedule be?'"¹³⁵

Furthermore, she added that when the father asked a question, the commissioner overreacted negatively, likely because of his race. "Dad asked a simple question. . . . I didn't think he was . . . inappropriate," she said.¹³⁶ He asked why he had to pay support, but in her view, he asked this question in a respectful and pleasant tone. But, she added, "Sometimes a simple question is perceived by certain individuals to be, uh, like defiant or like you have an attitude or the tone is, it's not that [laughs]."¹³⁷ By assuming that the father was behaving defiantly, the commissioner played into stereotypes of Black men. In the end, the commissioner set child support at a higher figure. She found this case very frustrating. "It had something to do with, you know, skin color," she explained.¹³⁸

She also mentioned noticing either ignorance of racial issues in the courtroom or reluctance to discuss race among her fellow child support enforcement employees. When she tried to talk about cases in which she believed racism played a role, she found herself met with resistance. Even with the coworkers whom she considered "more sensitive" to racial issues, she found that "people will always say no."¹³⁹ Expressing frustration with how her coworkers responded, she complained: "You weren't there and this is what I'm perceiving, and why is that, why is it so hard to acknowledge that or talk about it?"¹⁴⁰ Whiting's unsuccessful attempts to engage the other government attorneys in her office in a dialogue about the differential treatment that Black and White litigants receive in family court are understandably discouraging to her. They also underscore the pressing need for scholars studying the civil justice system to investigate whether and how race and race inequality play a role in how individuals' civil legal problems do (or do not) get resolved.¹⁴¹

¹³⁵ Interview by David J. Pate, Jr. with Ariel Whiting, Child Support Agency Attorney (Dec. 17, 2016) (on file with author).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See Brito et al., "*I Do for My Kids*," *supra* note 73, at 3028 ("Although the population of low-income Americans most affected by the civil justice gap is disproportionately minority, race and racial inequality are understudied areas of inquiry in the access to justice literature."). For recent access to justice scholarship addressing race and racial inequality, see generally Sara Sternberg Greene, *Race, Class and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016); Vicki Lens, *Judging the Other: The Intersection of Race, Gender and Class in Family Court*, 57 FAM. CT.

The two reformers shared similarities with the navigators. Like navigators, they were sensitive to the broader socioeconomic context surrounding child support enforcement involving poor families. Both types also expressed concern about how the legal system treats these cases. Unlike navigators, however, reformers went one step further in their efforts to alter the status quo and bring about change. They expressed a sense of responsibility for their roles in the cases and, as importantly, how the legal system operates. Their greatest contribution likely lies in their efforts to hold accountable other state legal actors operating in poor people's courts.

CONCLUSION

Four models of state legal actors emerge from the data—the navigator, the bureaucrat, the zealot, and the reformer. The bureaucrat will strive for a neutral-seeming evenhandedness in decision making that is premised on his or her perceived strict adherence to and mechanical application of purportedly inflexible legal rules. The navigator produces a type of partial justice in which the outcomes are better rather than worse. Navigators understand that child support enforcement involving indigent families can produce debtors' prisons and adopt an approach that seeks to reduce the harm but not ameliorate it. The zealots draw on well-worn and negative stereotypes of poor fathers to justify the legal system's use of the coercive power of the court system to responsibilize them into the successful breadwinners. Finally, reformers take steps within the system to bring about change and hold other legal actors accountable.